IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1296

H. STUART CUNNINGHAM, CLERK, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

vs.

CHICAGO COUNCIL OF LAWYERS, AN ASSOCIATION OF LAWYERS, EDGAR BERNHARD, ELMER GERTZ, CECIL C. BUTLER, WILLARD J. LASSERS, ROBERT PLOTKIN, JOHN H. SCHLEGEL, JOEL J. SPRAYREGEN, SAMUEL K. SKINNER, UNITED STATES ATTORNEY, JOHN J. TWOMEY, UNITED STATES MARSHAL, AND TERENCE F. MAC CARTHY, ROBERT S. BAILEY, WILLIAM A. BARNETT, CHARLES A. BELLOWS, EDWARD J. CALIHAN, JR., GEORGE F. CALLAGHAN, GEORGE J. COTSIRILOS, THOMAS D. DECKER, ANTONIO M. GASSAWAY AND CORNELIUS E. TOOLE, GENERAL COUNSEL, LEGAL OFFICE, CHICAGO METROPOLITAN COUNCIL NAACP,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 4, 1975.

OPINIONS BELOW.

The opinion of the Court of Appeals, reported at 522 F. 2d 242, appears at pages A1 to A29 in the Appendix hereto. The orders of the Court of Appeals denying petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* appear at pages A30 to A32 in the Appendix. The Memorandum and Order of the District Court for the Northern District of Illinois, Eastern Division, reported at 371 F. Supp. 689, appears at pages A33 to A46 in the Appendix.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 4, 1975. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on December 16, 1975, and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether Criminal Rule 1.07 and General Rule 8 of the United States District Court for the Northern District of Illinois, which proscribe dissemination of extrajudicial statements by attorneys while engaged in litigation "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice," are unconstitutional on their face because only those statements which "pose a serious and imminent threat of interference with the fair administration of justice" may be proscribed.

2. Whether Criminal Rule 1.07(b) of the United States District Court for the Northern District of Illinois, to the extent that it proscribes specified extrajudicial statements during the investigation stage of a criminal matter, is void for vagueness to the extent that it covers attorneys other than those associated with the investigation on behalf of the Government.

3. Whether Criminal Rule 1.07(e) of the United States District Court for the Northern District of Illinois, which proscribes lawyers associated with the prosecution or defense of a criminal matter from making specified extrajudicial statements during the period after trial and before sentencing, violates the First Amendment in all such instances.

4. Whether Disciplinary Rules 7-107(B) and (D) of the American Bar Association, which are incorporated within General Rule 8 of the United States District Court for the Northern District of Illinois, are partially void for vagueness because they proscribe dissemination of extrajudicial statements by lawyers (1) which constitute an opinion "on the merits" of a criminal case, or (2) which relate to "other matters" that are likely to interfere with a fair trial of a criminal case.

5. Whether Disciplinary Rule 7-107(G) of the American Bar Association, which is incorporated within General Rule 8 of

the United States District Court for the Northern District of Illinois and which proscribes dissemination of specified extra-judicial statements by lawyers in civil actions with which they are associated, violates the First Amendment under all circumstances.

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED.

UNITED STATES CONSTITUTION.

Amendment I.

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Amendment V.

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

RULES OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS.

Rule 1.07, Criminal Rules.

1.07 PUBLIC DISCUSSION BY ATTORNEYS OF PENDING OR IMMINENT CRIMINAL LITIGATION.

(a) It is the duty of the United States Attorney, or a lawyer or law firm not to release or authorize the release of information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which he or the firm is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

(b) With respect to a grand jury or other pending investigation of any criminal matter, the United States Attorney or a lawyer participating in or associated with the investigation shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

(c) From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, the United States Attorney, or a lawyer or law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, the United States Attorney may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the United States Attorney, or a lawyer or law firm during this period, in the proper discharge of his or its official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from

announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

(d) During the trial of any criminal matter including the period of selection of the jury, no United States Attorney, or lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial which a reasonable person would expect to be disseminated by means of public communication, except that the United States Attorney, or lawyer or law firm may quote from or refer without comment to public records of the court in the case.

(e) After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, the United States Attorney, or a lawyer or law firm associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

RULE 8, GENERAL RULES.

Rule 8. Discipline of Attorneys; Reinstatement.

The Executive Committee may order the disbarment or suspension of any attorney who (1) has been convicted of a felony in any federal, state or territorial court, or (2) has been disbarred or suspended by any such court. After notice and opportunity to respond, the judges of the Executive Committee may order the disbarment or suspension of any attorney who (1) has resigned from the bar of another court, or (2) has been convicted of a misdemeanor, or (3) is found to have committed acts of professional misconduct prejudicial to the orderly administration of justice such as fraud, deceit, malpractice or failure to abide by the provisions of the Canons of Ethics of the American Bar Association.

* * * * *

RULE 40, GENERAL RULES.

Rule 40. Release of Information by Attorneys in Civil Cases.

A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will interfere with a fair trial and which relates to:

(1) Evidence regarding the occurrence of transaction involved.

(2) The character, credibility, or criminal record or a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY.

DR 7-107 Trial Publicity.

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to de disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR7-107(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance, or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

* * * * *

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

* * * * *

STATEMENT OF THE CASE.

On May 5, 1969, some three years after this Court's decision in *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), and shortly following the September, 1968, approval by the Judicial Conference of the United States of the Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue ("Kaufman Report"), the United States District Court for the Northern District of Illinois ("District Court") adopted as its Criminal Rule 1.07, the court rules set forth in and recommended by the Committee and the Conference respecting comments by lawyers connected with criminal proceedings.[1] These rules remained in effect until March 9, 1971, when they were amended, with respect to criminal proceedings, to reflect the changes suggested by the Committee on the Operation of the Jury System and approved by the Judicial Conference of the United States in October, 1970.[2] On November 9, 1971, the District Court completed the adoption of the rules recommended by the Committee on the Operation of the Jury System by adopting as its General Rule 40, the Committee's recommendation with respect to civil cases.[3]

In addition to the above described rules directly governing statements by lawyers involved with criminal and civil proceedings before it, the District Court maintains a disciplinary

1. The "Report of the Committee on the Operation of the Jury System on the 'Free Press-Fair Trial' Issue" is reported at 45 F. R. D. 391 (1969). The recommended court rules are set forth at pp. 404-06. The approval of this report by the Judicial Conference is in the 1968 Judicial Conference Report at p. 67.

2. 1970 Judicial Conference Report at p. 58. These suggested changes are contained in the "Supplemental Report of the Committee on the Operation of the Jury System on the 'Free Press-Fair Trial' Issue" at 51 F. R. D. 135 (1971).

3. Rule 40, General Rules, U. S. D. Ct., N. D. of Ill. The adoption of this Rule followed the approval thereof given by the Judicial Conference in October, 1970 (1970 Judicial Conference Report at p. 58).

rule—General Rule 8—which provides for suspension or disbarment of attorneys "found to have committed acts of professional misconduct prejudicial to the orderly administration of justice such as . . . failure to abide by the Canons of Ethics of the American Bar Association."[4] General Rule 8 assumes that violations of Disciplinary Rule 7-107 of the American Bar Association's Code of Professional Responsibility which limits the extrajudicial statements of lawyers in substantially[5] the same manner as Criminal Rule 1.07 and General Rule 40 could be the subject of disciplinary proceedings.

With the District Court's rules in this posture, the courts below considered the action commenced by the respondents, Chicago Council of Lawyers and seven named attorneys, to have the District Court (1) declare its Criminal Rule 1.07 and ABA Disciplinary Rule 7-107 as incorporated into its General Rule 8 to be in violation of the First Amendment of the United States Constitution and (2) enjoin the petitioner's predecessor,[6] Elbert A. Wagner, Jr., Clerk of the United States District Court for the Northern District of Illinois, and respondents, William J. Bauer, United States Attorney, and John C. Meiszner, United States Marshal, who were named as defendants,[7] from enforcing the court rules in any situation where

4. General Rule 8 of the U. S. D. Ct., N. D. of Ill. This rule was amended on April 4, 1974, but the amendment appears to make no substantive change with respect to this ground for suspension or disbarment.

5. The Court below noted that there is one difference between Criminal Rule 1.07(d) and Disciplinary Rule 7-107(D), the difference being that the former does not contain the phrase "or other matters" contained in DR 7-107(D). See *infra*, p. 16.

6. Petitioner was substituted for Mr. Wagner on December 4, 1970, the date on which he became Acting Clerk of the District Court. Rule 25(d). Fed. R. Civ. P.

7. James R. Thompson was substituted for Judge Bauer on June 5, 1970 and Samuel K. Skinner was substituted for Mr. Thompson on November 31, 1975, pursuant to Rule 25(d), Fed. R. Civ. P. John J. Twomey was substituted for Mr. Meiszner on November 28, 1973. Rule 25(d), Fed. R. Civ. P.

the statements of any attorney did not "create a clear and present danger of a serious and imminent threat to the administration of justice."

Asserting jurisdiction in the District Court on the basis of 28 U. S. C. § 1331, the complaint sought relief against petitioner, the United States Attorney and the United States Marshal on the ground that the duties of each of these officials included "[P]articipation in the enforcement of the rules of the District Court." However, a motion to dismiss the complaint on the ground that it failed to state a claim upon which relief can be granted was sustained by the five judge Executive Committee of the District Court in a Memorandum and Order filed February 5, 1974 (371 F. Supp. 689).

On appeal the Court of Appeals for the Seventh Circuit reversed with one Judge dissenting in part. (522 F. 2d 242.) The majority, relying on the Seventh Circuit decisions in *Chase* v. *Robson*, 435 F. 2d 1059 (7th Cir. 1970), and *In re Oliver*, 452 F. 2d 111 (7th Cir. 1971), held the District Court's Criminal Rule 1.07 to be overbroad in its proscription of a lawyer's comments which a reasonable person would expect to be disseminated by public communication where "there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice." The Court of Appeals stated that "[o]nly those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed." 522 F. 2d at 249.

The Court of Appeals went on to hold that even if the "serious and imminent threat of interference with the fair administration of justice" standard were incorporated into the court rules in lieu of the "reasonable likelihood of interference with a fair trial" standard, the rules would still be invalid in certain respects. With respect to criminal matters, the Court of Appeals held:

1. To the extent that the language in Rule 1.07(b) proscribing statements by lawyers "participating in or associated with" an investigation of criminal activity covers lawyers on "the merits" of a criminal case (DR 7- vagueness.

2. The provisions of Rule 1.07(e) proscribing certain public comments by all lawyers associated with the prosecution and defense during the period following trial and prior to sentencing were held to be entirely void because the proscribed comments could never amount to a "serious and imminent threat of interference with the fair administration of justice."

3. To the extent that provisions of ABA Disciplinary Rules 7-107(B) and (D) which are incorporated within General Rule 8 of the District proscribe, following indictment and prior to trial, comments by participating lawyers on "the merits" of a criminal case (DR 7-107(B)(6)), or proscribe, during trial, comments by those lawyers which are embraced within the "or other matters" portion of the phrase prohibiting comment "that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial" (DR 7-107(D)) they are void for vagueness.[8]

The proscriptions against comments by lawyers engaged in civil cases contained in DR 7-107(G) and incorporated into District Court General Rule 8 were held to be invalid, even if the "serious and imminent threat" standard were incorporated in the rule. The majority said that the five general areas of proscribed comment relating to civil litigation were "individually and collectively" invalid.[9] 522 F. 2d at 258.

8. The District Court's Criminal Rule 1.07(c)(6) is similar to DR 7-107(B)(6), but Criminal Rule 1.07(d) does not contain the phrase "or other matters" of DR 7-107(D).

9. The Court of Appeals appears to have reached this conclusion because of the difference between the Sixth Amendment requirement of an "impartial jury" in criminal cases and the Seventh Amendment requirement of a "trial by jury" in civil cases. The court stated that "the mere invocation of the phrase 'fair trial' does not as readily justify a restriction on speech when we are referring to civil trials." 522 F. 2d at 258.

Petitioner sought rehearing in the Court of Appeals and suggested rehearing *en banc* in accordance with Rule 35 of the Federal Rules of Appellate Procedure. Rehearing was denied by the panel which heard the case. The suggested rehearing *en banc* was also denied even though four of the seven judges who voted on the suggestion favored *en banc* rehearing. This unusual result arose from the fact that because Judge Bauer disqualified himself, the four votes in favor of rehearing *en banc* did not constitute a "majority of the circuit judges who are in regular active service"[10] since there are eight such judges including Judge Bauer.

10. Rule 35(a), Fed. R. App. P.

REASONS FOR GRANTING THE WRIT.

While numerous questions relating to accommodation of First Amendment rights of free speech and Sixth Amendment rights of fair trial have been resolved in prior decisions, this case presents the Court with its first review of court rules, designed to comply with the directions in *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), which impose constraints upon the extrajudicial comments of lawyers engaged in litigation during the pendency of that litigation. Petitioner believes that the decision below undermines the *Sheppard* mandate and conflicts with the decision of the Court of Appeals for the Tenth Circuit in *United States* v. *Tijerina*, 412 F. 2d 661 (10th Cir.), *cert. denied*, 396 U. S. 990 (1969). A majority of the court below flatly rejected the rules approved by the Judicial Conference and, if permitted to stand, the decision will succeed in frustrating all the efforts of the judiciary to prevent prejudice to litigants in civil cases arising out of extrajudicial statements by the lawyers during trial.[11]

While *In re Sawyer*, 360 U. S. 622 (1959), dealt with public comments by a lawyer in pending litigation, the Court did not reach the constitutional issue. The plurality in *Sawyer* determined that the record did not support the state court's findings of professional misconduct, but declined to pass upon the lawyer's First Amendments claims, saying "[w]e do not reach or intimate any conclusion on the constitutional issues presented." 360 U. S. at 627. Concurring with the plurality in the result, Mr. Justice Stewart disavowed any intimation that the free speech rights of a lawyer engaged in a trial supersede rules of professional conduct drawn to protect interests in fair trials,

11. As noted at footnote 9, *supra*, the majority in the court below opined that fairness in civil trials has a lower order of importance, noting that an "impartial jury" is required in criminal cases "whereas the Seventh Amendment guarantees only 'trial by jury' in civil cases." 522 F. 2d at 258.

specifically referring to the Canons of Professional Ethics of the American Bar Association. 360 U. S. at 646-47.

1. The Decision of the Court of Appeals Undermines This Court's Decision in Sheppard v. Maxwell.

Speaking for the Court in *Sheppard*, Mr. Justice Clark made it clear that the courts have the power and affirmative obligation to control publicity that may impinge upon Sixth Amendment rights. The powers to transfer a case to another locality and to sequester a jury were mentioned, as well as the obligation to order a new trial if publicity during the proceedings threatens the fairness of the trial. *Sheppard* went on, however, to point out the unsatisfactory nature of reliance upon reversals, saying:

> But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps *by rule and regulation* that will protect their processes from prejudicial outside interferences. *Neither prosecutors, counsel for defense,* the accused, witnesses, court staff nor enforcement officers *coming under the jurisdiction of the court should be permitted to frustrate its function.* Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. (Emphasis supplied.) 384 U.S. at 363.

In order to assist the lower courts who would be called upon to implement these requirements, *Sheppard* was quite explicit regarding extrajudicial statements of lawyers and others involved with a proceeding:

> More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or in-

nocence; or like statements concerning the merits of the case. See *State* v. *Van Duyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. 384 U.S. at 361.

Notwithstanding the explicit directions in *Sheppard*, the majority opinion treated *Sheppard* as merely a general admonition to the courts, for it mentioned that decision in only two respects: first, in support of the unchallenged proposition that courts have inherent power to establish rules to protect the judicial process from prejudicial outside interference, 522 F. 2d at 248, 252; second, in order to assure fairness in judicial proceedings the rules must apply to defense attorneys as well as prosecutors, 522 F. 2d at 251. This cavalier treatment of *Sheppard* by the majority of the Court of Appeals panel so plainly ignores the directions in *Sheppard*—directions cast in terms so specific as to be unmistakable—that it appears to be a deliberate attempt sharply to limit this Court's decision.[12] It is difficult to believe that the majority of the court below were unaware of the fact that *Sheppard*, and a number of other decisions of this Court including *Estes* v. *Texas*, 381 U. S. 532 (1965), *Turner* v. *Louisiana*, 379 U. S. 466 (1965), and *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), have held that Sixth Amendment rights of fair trial are not afforded where publicity associated with a trial creates a reasonable likelihood or probability of prejudice to the accused. Certainly the rules and regulations which the lower courts were directed to promulgate must be broad enough to protect those Sixth Amendment rights.[13]

12. Petitioner finds nothing in post-*Sheppard* decisions which foreshadows a retreat from the views expressed in that case. The assertion in *Sheppard* that the trial court could have proscribed prejudicial extrajudicial statements by the lawyers was quoted in *Branzburg* v. *Hayes*, 408 U. S. 665, 685 (1972).

13. Another example of the apparent rejection of *Sheppard* is the majority's finding that DR 7-107(B)(6) [and thus the counterpart Local Criminal Rule 1.07(c)(6)] is impermissibly broad in

2. There Is No Sound Authority for the "Serious and Imminent Threat" Test Created by the Court of Appeals.

The majority opinion of the Court of Appeals struck down *in toto* the District Court's Criminal Rule 1.07 and Disciplinary Rule 7-107 of the American Bar Association's Code of Professional Responsibility, which is incorporated into the District Court's Local General Rule 8 that provides for the disciplining of attorneys. All of the rules are swept aside because the Court of Appeals rejected the "reasonable likelihood' standard incorporated in both the rules approved by the Judicial Conference of the United States and the American Bar Association's Code of Professional Responsibility.[14] The majority opinion, 522 F. 2d at 249, said:

> We are of the view that the rubric used in the rules under consideration, that lawyers' comments about pending or imminent litigation must be proscribed "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice" is overbroad and therefore does not meet constitutional standards. Instead, we think a narrower and more restrictive standard, the one formulated in *Chase* v. *Robson*, 435 F.2d 1059, 1061-62 (7th Cir. 1970), and reaffirmed in *In re Oliver*, 452 F.2d 111 (7th Cir. 1971), should apply: Only those comments that pose a "serious and imminent threat" of interference with the fair administration of justice can be constitutionally proscribed.

prohibiting a lawyer engaged in a case from expressing an opinion as to the guilt or innocence of the accused, the evidence, "or the merits of the case." The majority said, "We are not sure what is encompassed by the term 'merits,'" 522 F. 2d at 255, notwithstanding the fact that the same word was used in *Sheppard*, when this Court said the trial judge could have proscribed extrajudicial expressions of opinion by the lawyers as to "any belief in guilt or innocence; or like statements concerning the merits of the case." 384 U. S. at 361.

14. The district court determined that the "reasonable likelihood" standard set out in the general statement in Local Rule 1.07(a) applies to all succeeding paragraphs, 371 F. Supp. at 691, fn. 2.

The only authorities cited by the Court of Appeals in obliterating all the rules in question are two of that court's own earlier decision, *Chase* v. *Robson*, 435 F. 2d 1059 (7th Cir. 1970), and *In re Oliver*, 452 F. 2d 111 (7th Cir. 1971), which, in turn, relied upon *Craig* v. *Harney*, 331 U. S. 367 (1947), and *Wood* v. *Georgia*, 370 U. S. 375 (1962); see 435 F. 2d at 1061 and 452 F. 2d at 114. Yet neither *Craig* nor *Wood* dealt with standing court rules relating to the professional conduct of lawyers engaged in a trial. *Craig* was a review of a criminal contempt conviction and sentencing of a newspaper publisher and two of his reporters in a summary proceeding based upon common law doctrine. In *Craig* the Court observed that it was not dealing with "questions concerning the full reach of the power of the state to protect the administration of justice by its courts," 331 U. S. at 373. *Wood* involved a sheriff running for reelection who publicly criticized a county judge's charge to a grand jury. Constitutional rights of litigants to a fair trial in a pending case were not at issue. This critically important distinction was specifically noted by the Court in *Wood:*

> First, it is important to emphasize that this case does not represent a situation where an individual is on trial; there was no "judicial proceeding pending" in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding. 370 U.S. at 389.

Craig and *Wood* and their progenitors, *Bridges* v. *California*, 314 U. S. 252 (1941), and *Pennekamp* v. *Florida*, 328 U. S. 331 (1946), were reviews of contempt convictions of newsmen or other laymen involving the extent of the contempt power, "a common law concept of the most general and undefined nature." *Bridges* v. *California, supra,* at 260. The primary concern in all those cases was whether the public criticisms were impermissible interference with the administration of justice or causing disrespect for the judiciary generally. As the district court correctly noted in the case below, "None dealt with the violation

of a narrowly drawn statute or court rule which seeks to accommodate competing constitutional interests." 371 F. Supp. at 693.

The increase in numbers of cases dealing with fair trial-free press generally in recent years is no doubt attributable in some measure to technological developments which, as the Fifth Circuit recently said, have "catapulted the news industry into the electronic age, endowing the press with theretofore unimagined powers of dissemination of information, literally to the entire world. With the advent of this capacity for mass communications, the potential of the news media to influence the outcome of court proceedings, long recognized as a likelihood, was finally seen really to be more than theoretical," *United States* v. *Dickinson*, 465 F. 2d 496, 503 (5th Cir. 1972). The potentially adverse impact upon the evenhanded administration of justice resulting from the "pervasiveness of modern communications" which troubled the Court in *Sheppard*, 384 U. S. at 362, has by no means diminished in the ensuing years.

Further, the reasonable likelihood test is virtually a necessity because of the broadened grounds for reversal of convictions in criminal cases. It was once necessary for a convicted person to establish actual prejudice from publicity in order to obtain a new trial or reversal of his conviction, but now such person need only show a reasonable likelihood, or probability, of prejudice. *Sheppard* v. *Maxwell*, 384 U. S. at 362-63; *Estes* v. *Texas*, 381 U. S. 532, 542-44 (1965); *United States ex rel. Doggett* v. *Yeager*, 472 F. 2d 229, 239 (3d Cir. 1973). Mr. Justice Stewart, concurring in *Chapman* v. *California*, 386 U. S. 18, 43-44 (1967), said: "To try a defendant in a community that has been exposed to publicity highly adverse to the defendant is *per se* ground for reversal of his conviction; no showing need be made that the jurors were in fact prejudiced against him." It must follow that if a criminal defendant need only show a reasonable likelihood of prejudice in order to obtain a reversal of his conviction, any requirement which imposes an arguably

more stringent standard, *e.g.*, "serious and imminent threat" to the administration of justice, before a source of prejudicial publicity can be closed, completely frustrates courts in the discharge of the obligations imposed upon them.

3. The Decision of the Court of Appeals Conflicts with a Decision of the Tenth Circuit.

The Court of Appeals for the Tenth Circuit in *United States* v. *Tijerina*, 412 F. 2d 661 (10th Cir.), *cert. denied*, 396 U. S. 990 (1969), recognizing the obligations imposed upon trial courts by *Sheppard* to protect the judicial processes from the reasonable likelihood of prejudicial outside interferences, sustained a trial court's order limiting extrajudicial comments on the ground that the order met the "reasonable likelihood" test of *Sheppard*. In sustaining the "reasonable likelihood" test the Tenth Circuit expressly rejected the argument that the order proscribing extrajudicial comments was improper because it failed to incorporate a "clear and present danger" standard—terms which this Court in *Craig* treated as interchangeable with the terms "serious and imminent threat."[15] The *Tijerina* court said:

> The order is based on a "reasonable likelihood" of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. *We believe that reasonable likelihood suffices.* The Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial. 412 F. 2d at 666. (Emphasis supplied.)

Since there is no explicable difference between "serious and imminent threat" and "clear and present danger," *Tijerina* is directly contrary to the decision below. Yet the court below in this case treated with *Tijerina* by ignoring it, apparently content

15. The respondents who brought this action recognized this in the District Court, conceding those terms to be "substantially identical."

with its previous misstatement in *Chase* v. *Robson* that the test established in *Tijerina* was "a reasonable likelihood . . . of a serious and imminent threat to the administration of justice." (see 435 F. 2d at 1061.) It is clear that this was not the holding of *Tijerina* and it is equally clear that the decision herein is irreconcilable with that decision.

4. In Holding That the Rules Adopted by the Judicial Conference Are Unconstitutional, the Court Below Did Not Give Proper Weight to the Quasi-Legislative Nature of the Rules.

Criminal Rule 1.07 was drawn verbatim from the rules developed by the Kaufman Committee, which were ultimately approved by the Judicial Conference of the United States, as the district court below pointed out in its opinion. 371 F. Supp. at 692 fn. 4.

In addition to *Sheppard* and the other cases cited above, there were other events which compelled the response by the federal judiciary that culminated in the Kaufman Report. Those events are succinctly described in the Kaufman Report. See 45 F. R. D. at 393, *et seq.*

The Report followed more than two years of intense study and deliberation by the full Committee on the Operation of the Jury System and by a subcommittee of the full Committee, the Subcommittee to Implement *Sheppard* v. *Maxwell*. In addition to drawing on the wisdom and experience of scores of federal judges, the Committee and its Subcommittee considered studies of the subject by the organized bar, particularly the Reardon[16]

16. The Reardon Report is the product of more than twenty months of study and labor by the American Bar Association's Advisory Committee on Fair Trial and Free Press under the chairmanship of Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court and the Committee's Reporter, Professor David L. Shapiro of the Harvard Law School. The Reardon Report contains specific recommendations on controlling the impact of publicity on the administration of criminal justice. 45 F. R. D. at 397.

and Medina[17] Committees. The Subcommittee met with Department of Justice officials. Recommendations of the press regarding ways to safeguard the right to fair trial without restricting the freedom of the press were studied. The full Committee met with and heard from spokesmen for the television, radio and newspaper media. Drafts and revised drafts of the proposed rules were circulated among all federal judges with requests for comments and suggestions. The individual and collective opinions of federal judges reviewed at a meeting of the Committee overwhelmingly reflected general satisfaction with all recommendations of the Report. 45 F. R. D. at 399-400. If this was not prior deliberation entitled to great weight, in the words of *Bridges*, it is difficult to envision what is needed in order to weigh heavily in a constitutional challenge.

The Court of Appeals below acknowledged that the rules in question, developed by the federal judiciary through its official agency, the Judicial Conference of the United States, was acting in a legislative or quasi-legislative, rather than in an adjudicatory capacity. 522 F. 2d at 252. For more than three decades this Court has recognized that when regulatory measures in this sensitive area are incorporated in legislative enactments, that fact must weigh heavily in favor of their validity, for they come "encased in the armor wrought by prior legislative deliberation," *Bridges* v. *California*, 314 U. S. 252, 261 (1941). Here again the Court of Appeals' opinion ignored the pronouncements of this Court. Indeed, the court commenced its consideration by saying: "Thus, while we do not begin our examination with a 'heavy presumption' against validity, we are aware of the fact that these court rules must endure even closer scrutiny than a

17. The Medina Report was proffered by The Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York. This Committee was chaired by Senior Judge Harold R. Medina of the United States Court of Appeals for the Second Circuit. 45 F. R. D. at 397 and fn. 7.

legislative restriction." 522 F. 2d at 249. No authority is cited in support of this assertion.[18]

Unless this Court intervenes, these rules, developed with such painstaking care and since adopted in some eighty of the ninety-four district courts, will be rendered a nullity by the two judges who joined in the majority opinion of the Court of Appeals in this case. And all upon the incantation of "clear and present danger" or "serious and imminent threat," a dubious practice[19] that is not an adequate substitute for a thoughtful weighing of values.

5. Litigants in Civil Cases Are Also Entitled to Fair Trials.

Obviously, the majority opinion rejected out of hand the judgment of the Judicial Conference, which endorsed the Supplemental Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 51 F. R. D. 135 (1971). In its sweeping denunciation of DR 7-107(G) of the Code of Professional Responsibility, the court below flatly rejected the nearly universal view of the federal judiciary which found expression in the amendment to the Kaufman Report that "civil litigants, as well as criminal, can be prejudiced in their right to a fair trial by out-of-court statements," 51 F. R. D. at 138.

Indeed, the court below summarily dismissed the position of the Judicial Conference with the assertion "that the mere invocation of the phrase 'fair trial' does not as readily justify a restriction on speech when we are referring to civil trials." 522 F. 2d at 258. If the views expressed by the majority below are

18. The quotations from *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972), *Shelton* v. *Tucker*, 364 U. S. 479 (1960), and *Procunier* v. *Martinez*, 416 U. S. 396 (1974), by the court below (522 F. 2d at 249) in no way support the lower court's *ipse dixit* that these narrowly drawn court rules adopted to preserve rights to a fair trial must bear even closer scrutiny than legislative enactments.

19. See Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 Sup. Ct. Rev. 41.

sound constitutional law, the judiciary cannot by court rule restrict in any effective fashion the extrajudicial statements of attorneys engaged in civil trials. While the opinion was necessarily limited to ruling on the five general areas of proscribed comment incorporated in DR 7-107(G), in holding "that individually and collectively they would be constitutionally impermissible," 522 F. 2d at 258, the opinion leaves no basis which would support any restriction in civil litigation.

This surprising position is premised on the notion that one of the primary functions of civil litigation is to serve as a forum for mobilizing public opinion and groups in society for or against "important social issues," 522 F. 2d at 258. The majority opinion evidently adopted the rationale of the plaintiffs-appellants that "[i]t is a truism that in America most major social and even political issues find their way, in one form or another, to court," and that we run the risk of hampering public discussion of important issues if we eliminate from the discussion the lawyer who is handling the case, because "the lawyers in the case are likely to be among the most informed persons and to have thought more about the issues than anyone else." (Brief of Plaintiffs-Appellants, at pp. 16 and 17.) An invitation to lawyers in civil litigation to try their cases in the "court of public opinion" could scarcely be more clearly stated, for it must be remembered that the proscriptions of the rules invalidated apply to a participating lawyer only during the pendency of the litigation. If the trial lawyer must be permitted to make his extrajudicial statements *during the course of the trial,* it can only be for one reason—to influence the outcome of the litigation. As the Court observed in *Sheppard,* quoting the familiar words of Mr. Justice Frankfurter, "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." 384 U. S. at 350.

The court below advanced this thesis in part upon the claim that this may be the only way to protect the interests of the "poor or powerless citizens," 522 F. 2d at 258. Petitioner submits

that quite the opposite is true. This utilization of the courts is much more likely to give an unfair advantage to those who are powerful and well placed enough to have access to or control over the press and electronic media in marshalling or manipulating public opinion for or against the issues. The steady decline in the number of newspapers and magazines throughout the country, and corresponding concentration of ownership and control of all news media,[20] aggravate the problem of the "poor or powerless" if litigants and their lawyers are permitted to use the media rather than the courtroom as a forum to resolve litigation. It is only the lawyer who has "connections" with the media, or who has a case that is bizarre or otherwise notorious enough to become newsworthy, who will be able to make good recent boasts about orchestrating the press.

In sum, the judiciary's narrowly drawn rules involved in this case, which are applicable only to lawyers while associated with a pending case, can have no significant effect upon the free flow of information protected by the First Amendment.[21] As Mr. Justice Frankfurter with characteristic eloquence reminded us in *Sawyer:*

> An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an "officer of the court" in the most compelling sense. He does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he has ample chance to make such claims to the courts in which he litigates. 360 U.S. at 668.

Finally, the petitioner is constrained to call the Court's attention to threshold questions of standing, necessary parties and other jurisdictional issues which were ignored by the Court of Appeals. The concurring opinion frankly conceded: that the court could be passing "judgment upon imaginary cases,"

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20. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 390-91 and fn. 28 (1974).

21. See *Branzburg* v. *Hayes,* 408 U. S. 665, 691 (1972).

522 F. 2d at 259; that the court was dealing with "hypothetical cases," 522 F. 2d at 260; and that the opinion "partakes of the nature of an advisory opinion" because it is "not addressed to specific, concrete facts," 522 F. 2d at 260. As noted in petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc*, if the drafting and promulgation of the rules in question by the federal judiciary was a quasi-legislative function, as the members of the panel appear to have agreed, they did not explain just how they were exercising a judicial function in this case.

CONCLUSION.

For the reasons above, a Writ of Certiorari should be issued to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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March, 1976.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 74-1305.

CHICAGO COUNCIL OF LAWYERS, et al.,
Plaintiffs-Appellants,

vs.

WILLIAM J. BAUER, et al.,
Defendants-Appellees.

Before CASTLE, *Senior Circuit Judge*, SWYGERT, *Circuit Judge*, and WYZANSKI, *Senior District Judge*.[1]

SWYGERT, *Circuit Judge*. The question posed by this appeal is whether the "no-comment" rules of the District Court for the Northern District of Illinois deprive lawyers of their free speech rights under the First Amendment.

The plaintiffs, Chicago Council of Lawyers and seven members of the Chicago bar, brought this action seeking injunctive and declaratory relief on behalf of themselves and all lawyers who practice before the District Court for the Northern District of Illinois. They sought a determination that Rule 1.07 of the District Court's Local Criminal Rules (Appendix A)

1. The Honorable Charles E. Wyzanski, Jr., Senior Judge for the United States District Court for the District of Massachusetts, is sitting by designation.

and Disciplinary Rule 7-107 of the American Bar Association's Code of Professional Responsibility (Appendix B) (which the District Court assumed *arguendo* was incorporated within Local General Rule 8[2]) are unconstitutionally vague and overbroad. The named defendants are the United States Attorney for the Northern District of Illinois, the Marshal for the District Court, and the Clerk of the District Court, all of whom are alleged to participate in the enforcement of these rules.[3] The intervening defendants are attorneys who regularly engage in the representation of defendants in criminal cases in the Northern District of Illinois. Motions to dismiss for failure to state a cause of action were filed on behalf of the defendants and granted by the district judges comprising the Executive Committee of the District Court. The reasons given for the judges' action were incorporated in a "Memorandum and Order" which appears at 371 F. Supp. 689 (N. D. Ill. 1974).

I

The plaintiffs contend that the "no-comment" rules unconstitutionally restrict lawyers' rights to comment publicly on pending litigation and to hear and read such public comment

2. General Rule 8 reads in part:

> Rule 8. Discipline of Attorneys; Reinstatement.
>
> The Executive Committee may order the disbarment or suspension of any attorney who (1) has been convicted of a felony in any federal, state or territorial court, or (2) has been disbarred or suspended by any such court. After notice and opportunity to respond, the judges of the Executive Committee may order the disbarment or suspension of any attorney who (1) has resigned from the bar of another court, or (2) has been convicted of a misdemeanor, or (3) is found to have committed acts of professional misconduct prejudicial to the orderly administration of justice such as fraud, deceit, malpractice or failure to abide by the provisions of the Canons of Ethics of the American Bar Association.

3. The district court apparently determined that the proper defendants were named and we assume this to be true for the purposes of this appeal.

by other lawyers because the rules are not restricted to situations which present a "clear and present danger of a serious and imminent threat to the administration of justice." They argue that lawyers are entitled to full First Amendment rights and that the "reasonable likelihood of interference with a fair trial" standard employed by these rules is unconstitutional. Collaterally, the plaintiffs contend that many of the rules are constitutionally infirm because they are either vague or overbroad or both. Before discussing the separate rules, some general comments are in order.

Plaintiffs say that they do not ask constitutional protection for comment on litigation that *"in fact* affects or poses a clear and present danger to the administration of justice" or *"in fact* constitutes a serious and imminent threat to the administration of justice." They acknowledge the right of courts to protect their trials and to take all reasonable means to ensure a fair trial to every litigant. The plaintiffs argue that fair trials are not in issue because they "do not seek to protect lawyers' comments that actually impair the ability of the trial court to afford fair trials." Finally, they maintain that there is no need to "balance" the First Amendment rights of lawyers against litigants' due process rights to fair trials since these two rights do not compete.

We are not as sanguine as plaintiffs that there is no competition or conflict between the right of lawyers to free speech and the right of litigants to fair trials. If by noncompetition they mean that from an ideal or abstract view the two rights can and should coexist without disharmony, we might agree; however, pragmatically, in everyday situations there are bound to be conflicts. Consequently, when irreconcilable conflicts do arise, the right to a fair trial, guaranteed by the Sixth Amendment to criminal defendants and to all persons by the Due Process Clause of the Fourteenth Amendment, must take precedence over the right to make comments about pending litigation by lawyers who are associated with that litigation if such com-

ments are apt to seriously threaten the integrity of the judicial process. We do not understand the plaintiffs to take a contrary position. That courts have the duty to ensure fair trials—"the most fundamental of all freedoms"[4]—is beyond question. The Supreme Court made this clear in *Sheppard* v. *Maxwell*, 384 U. S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). Moreover, the Court in that case settled the corollary proposition that courts have the power to "take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." 384 U. S. at 363, 86 S. Ct. at 1522.

The statement of these general propositions leads us a step further toward a solution of the issue raised in this appeal. Since the right of free speech must give way to the right of a fair trial when there is an irreconcilable conflict, the next inquiry relates to the limits of the circumscription on comment that lawyers can be required to observe consistent with their rights under the First Amendment.

A preliminary issue that should be addressed is whether we are to evaluate such rules as "prior restraints." A restriction deemed a prior restraint may not be per se unconstitutional, but it does come before us "with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419, 91 S. Ct. 1575, 1578, 29 L. Ed. 2d 1 (1971). It is important to note, however, Mr. Justice Frankfurter's admonition that the phrase "prior restraint" not be deemed a "self-wielding sword" nor a "talismanic test." *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 441, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957). Our case presents a perfect example of a situation in which the meaning behind the phrase should be examined. Admittedly, the rules in question have some elements similar to that which we have traditionally termed "prior restraints." A violation of the rules can be punished by the contempt power just like a failure to obey an injunction. The full criminal procedural safeguards, including the right to trial by jury, would not

4. *Estes* v. *Texas*, 381 U. S. 532, 540, 85 S. Ct. 1628, 1632, 14 L. Ed. 2d 543 (1965).

necessarily be available. Punishment by contempt is an important attribute of a "prior restraint" that distinguishes it from a criminal statute that forbids a certain type of expression.

But in an equally important aspect these rules differ from a "prior restraint." Normally a "prior restraint" constitutes a predetermined judicial prohibition restraining specified expression and it cannot be violated even though the judicial action is unconstitutional if opportunities for appeal existed and were ignored. *See Walker* v. *City of Birmingham*, 388 U. S. 307, 87 S. Ct. 1824, 18 L. Ed. 2d 1210 (1967). The validity of court rules, however, can be challenged by one prosecuted for violating them since we have held that there is a fundamental distinction in this regard between actions taken by the court in its legislative role and those taken in its adjudicative role. *In re Oliver*, 452 F. 2d 111 (7th Cir. 1971).

The conclusion we reach from this analysis is that we cannot label the no-comment rules as "prior restraints" given the connotations of that term, but we do recognize that these rules have some of the inherent features of "prior restraints" which have caused the judiciary to review them with particular care. Thus, while we do not begin our examination with a "heavy presumption" against validity, we are aware of the fact that these court rules must endure even closer scrutiny than a legislative restriction.

This scrutiny centers on certain constitutional standards relating to clearness, precision, and narrowness. Rules which deny a lawyer his First Amendment rights in the interest of a fair trial must be neither vague nor overbroad. As the Supreme Court said in *Grayned* v. *City of Rockford*, 408 U. S. 104, 109, 92 S. Ct. 2294, 2299, 33 L. Ed. 2d 222 (1972):

> [W]here a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." (footnotes omitted).

In *Shelton* v. *Tucker*, 364 U. S. 479, 488, 81 S. Ct. 247, 252, 5 L. Ed. 2d 231 (1960), the Supreme Court discussed the matter of overbreadth:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basis purpose. (footnotes omitted).

We should keep in mind that extrajudicial comments which might impair the "orderly and fair administration of justice in a pending case," *Bridges* v. *California*, 314 U. S. 252, 263, 62 S. Ct. 190, 194, 86 L. Ed. 192 (1941), must be measured as are other utterances that are proscribed by reason of a counter-compelling governmental interest. "[T]he limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier* v. *Martinez*, 416 U. S. 396, 413, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224 (1974).

Given these constitutional standards for guidance, we must ask: What test should apply to extrajudicial comments of lawyers about a pending proceeding that are apt to affect the fairness of the proceeding and therefore may be curtailed?

We are of the view that the rubric used in the rules under consideration, that lawyers' comments about pending or imminent litigation must be proscribed "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice" is overbroad and therefore does not meet constitutional standards. Instead, we think a narrower and more restrictive standard, the one formulated in *Chase* v. *Robson*, 435 F. 2d 1059, 1061-62 (7th Cir. 1970), and reaffirmed in *In re Oliver*, 452 F. 2d 111 (7th Cir. 1971), should apply: Only those comments that pose a "serious and imminent threat" of interference with the fair

administration of justice can be constitutionally proscribed. Given the objectives of clearness, precision, and narrowness we are of the view that this formulation is more in keeping with the precepts announced by the Supreme Court to which we have alluded than the one used by the local rules of the district court. A lawyer is put on stricter notice if he must gage his intended comments by a test that limits only comments which are a serious and imminent threat of interference with a fair trial than if his statements were governed by the more amorphous phrase: "a reasonable likelihood that such comment will interfere with a fair trial."

We should emphasize at this point, however, that this standard is not constitutionally sufficient by itself. While the application of the standard to these rules can eliminate overbreadth, the specific rules are also necessary in order to avoid vagueness. The rules furnish the context necessary to determine what may constitute a "serious and imminent threat" of interference with the fair administration of justice.

II

A few further general observations are necessary. The fact that it is the comments of lawyers involved in the litigation that is curtailed is of importance to both sides of the issue. Attorneys' statements are often the source of prejudicial publicity,[5] especially since their views and comments are usually accepted by the public on the basis that they come from a wellspring of reliable information. Restricting such comment can be a significant aid in controlling publicity which may affect the fairness of a trial. Thus, these rules might be viewed as the "least burdensome alternative" if a partial solution to the problem is accomplished by prohibiting only the speech of a very small group whose members are officers of the court with a special interest in protecting the integrity of our system of justice. Yet, there are

5. *See* Association of the Bar of the City of New York, Special Committee on Radio, Television, and the Administration of Justice, *Freedom of the Press and Fair Trial, Final Report with Recommendations* (1967) at 14-19.

important countervailing factors. Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion. Often their clients will not be as articulate or informed. And despite our primary focus on prejudicial statements, we must keep in mind that there are important areas of public concern connected with current litigation. We can note that lawyers involved in investigations or trials often are in a position to act as a check on government by exposing abuses or urging action. It is not sufficient to argue that such comment can always be made later since immediate action might be necessary and it is only when the litigation is pending and current news that the public's attention can be commanded.

The barring of comment by lawyers representing criminal defendants may seem questionable for a variety of other reasons. The Sixth Amendment speaks only of the right of an accused and the Fifth Amendment only of the right of persons and not of the Government. The publication of the fact that a person is under investigation or is charged with the commission of a crime makes it difficult for the person involved to counter any injury to himself, his family, or friends caused by the publicity if his attorney is allowed only to say without elaboration that his client maintains his innocence. Under the no-comment rules, the lawyer, who usually is more articulate and more knowledgeable in the law than the accused, can perhaps best speak about such matters as defenses or the reputation of the accused as a law-abiding citizen. Only slight reflection is needed to realize that the scales of justice in the eyes of the public are weighed extraordinarily heavy against an accused after his indictment. A bare denial and a possible reminder that a charged person is presumed to be innocent until proved guilty is often insufficient to balance the scales.

Regardless of these considerations and our disquietude, we nonetheless believe that certain proscriptions on speech can constitutionally be invoked against defense counsel. We must not

forget that public justice is no less important than an accused's right to a fair trial. The Reardon Committee drew no difference between the prosecutor and defense counsel when discussing its recommendations relating to the conduct of attorneys.[6]

Finally, and more important, we are mandated by *Sheppard* v. *Maxwell*, 384 U. S. 333, 363, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), to acknowledge that rules adopted by courts relating to attorneys' conduct and the protection of fair judicial proceedings should cut both ways:

> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. 384 U. S. at 363, 86 S. Ct. at 1522.

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6. The Committee's research indicates that, although potentially prejudicial disclosures by lawyers participating in a criminal case are relatively infrequent, they do occur and have on many occasions caused considerable difficulty. Moreover, they are particularly likely to occur in cases that arouse substantial public interest, and in these cases it is not unusual for both sides to become active in courting public favor through the press.

Such conduct by attorneys representing the parties in a criminal proceeding is most reprehensible. The lawyer has a high professional obligation to maintain the integrity of the system he helps to administer. His duty to his client, of course, is cardinal, but that duty does not serve to justify an effort to win a criminal case through resort to the media on matters that must be decided only in the courtroom. . . . If a public official violates the standards of conduct in releasing information, the Committee believes that the appropriate response by defense counsel is not to debate the merits of the case in the media but to seek the imposition of judicial discipline and to protect his client by resort to one or more of the remedies described in Part III of the recommendations. Indeed, public debate of the merits may well aggravate the prejudice to the defendant, particularly if it induces a further response by the prosecution, and may render more difficult the obtaining of judicial relief. (footnotes omitted). Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press*—Approved Draft (1968) at 80-86.

III

These rules as they now read are, in our opinion, constitutionally infirm. This general infirmity results from a failure to specifically incorporate within each provision the serious and imminent threat standard. We do not believe that there can be a blanket prohibition on certain areas of comment—a per se proscription—without any consideration of whether the particular statement posed a serious and imminent threat of interference with a fair trial. Yet these rules establish such a blanket prohibition whereby even a trivial, totally innocuous statement could be a violation. The First Amendment does not allow this broad a sweep.

Still, we think there is a place and need for specific provisions in properly drawn rules. Lawyers must be aware of exactly what areas of speech might pose a serious and imminent threat of interference with a fair trial. The serious and imminent standard must always be an element of any prohibition.[7] We think that it is proper to formulate rules which would declare that comment concerning certain matters will presumptively be deemed a serious and imminent threat to the fair administration of justice so as to justify a prohibition against them. One charged with violating such a rule would of course have the opportunity to prove that his statement was not one that posed such a serious and imminent threat, but the burden would be upon him.

We find that with the inclusion of a generally applicable serious and imminent threat standard, many of the challenged rules could be considered as rules establishing such a presumption. Of course, allowing this type of presumption is itself a serious limitation of free speech. Each provision of these rules must be examined to determine whether the particular restrictive presumption is a proper basis for such a limitation.

7. The district court did hold that the "reasonable likelihood" standard embodied in the general statement in Local Rule 1.07(a) was to apply to all succeeding paragraphs.

IV

We proceed then to the specific rules, examining first the no-comment rules relating to criminal matters. Most of the literature[8] and debate have centered on the problem of prejudicial publicity in criminal trials. As we have previously noted, the Supreme Court set the stage for court rules in this area by its observations in *Sheppard* v. *Maxwell.*

Local Rule 1.07 was in substantial part drawn verbatim from the suggested rules of the Kaufman Report which was prepared by twelve federal judges and ultimately adopted by the Judicial Conference of the United States. We think it is our duty, however, to examine the specific recommendations of this prestigious committee for it was acting in a legislative rather than an adjudicatory capacity. *See In re Oliver,* 452 F. 2d 111 (7th Cir. 1971). With deference, we must dissect the rules and subject them to constitutional scrutiny.

The rules[9] pertaining to comment relative to criminal matters are divided according to the different stages of the criminal

8. Various studies and reports have been published including: Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press,* Approved Draft (1968) [hereinafter cited as the Reardon Report]; Committee on the Operation of the Jury System, Judicial Conference of the United States, *Report of the Committee on the Operaion of the Jury System on the "Free Press-Fair Trial" Issue* (Sept. 1968), reported in 45 F. R. D. 391 [hereinafter cited as the Kaufman Report]; Association of the Bar of the City of New York, Special Committee on Radio, Television, and the Administration of Justice, *Freedom of the Press and Fair Trial, Final Report with Recommendations* (1967) [hereinafter cited as the Medina Report].

9. Local Rule 1.07 and DR 7-107(A)-(E) are substantially the same except that there is no counterpart to Rule 1.07(a) which is a general introductory section indicating that lawyers should make no public statements which would have a "reasonable likelihood" of interference with a fair trial or prejudice. We assume that this section or one like it would never be cited by itself as a basis for an alleged violation, since there are specific sections with particularized restric-

process. Rule 1.07(b) and DR 7-107(A) proscribe statements[10] during the investigative stages. These prohibitions are quite restrictive, but this is an unusual time frame in the prosecutorial process. While no one will have been formally charged with a crime, there may be great interest in the news media in the subject of the investigation. With new developments constantly occurring the potential for prejudicial publicity is considerable. Moreover, since there are no formal court proceedings pending there is no opportunity to obtain a specific pre-trial order limiting out-of-court statements. We can at least note that the mere statement that a particular individual is the subject of a grand jury investigation can have serious ramifications. The secrecy of grand jury proceedings must be strictly maintained.

Regardless of these considerations, there are serious problems with this section of the rules. The phrase "participating in or associated with the investigation" is ambiguous when applied to lawyers other than prosecutors. Does it cover attorneys representing witnesses before a grand jury? What about attorneys for individuals or corporations who are rumored to be the subject of an investigation? How much interchange with the prosecutors need they have before they become "associated with the investigation"? We cannot tell and neither could the conscientious attorney trying to determine if he could speak on behalf of his client. Indeed, the rules do not even allow a statement that the individual in question denies any involvement in any criminal activity. Nor may the attorney publicly charge an abuse of the grand jury proceedings. The investigatory stage is not actually a part of the judicial process. The discretion is placed in the executive—the prosecutor. An important check on his use of

tions covering all phases of "pending or imminent criminal litigation." *See* Reardon Report at 84-85.

10. Although we refer throughout the opinion to restrictions or "statements" or "comment," only those that "a reasonable person would expect to be disseminated by means of public communication" are covered by these rules.

that discretion is the political process. It is imperative that we allow as much public discussion as feasible about the way in which this authority is being exercised. The scope and purpose of an investigation is a legitimate subject for public concern and comment. Those in the best position to inform the public on that issue should be free to do so.

The section under discussion is too vague in terms of its application to attorneys other than those involved on behalf of the Government. More important, the restrictions are too broad for the benefit that may be derived. No one knows at that stage if a prosecution will develop and if there will be a trial that must be protected. It is unlikely that an attorney would attempt a "newspaper defense" of charges that have not been formally lodged. The possibility of prejudice to the Government's case, which has not even been presented by indictment or information, is too remote in view of the countervailing interests to justify these restrictions on nonprosecution attorneys.

Those attorneys involved in the investigation for the Government are in a different position. They have the ability to influence and ensure proper governmental procedure without resort to public opinion. Moreover, they know what charges may be brought and are a prime source of damaging statements. Admittedly, our formulation may place prosecutors in a difficult position since they may be criticized for a particular investigation but may not publicly respond. This is a situation that competing interests necessitate. Ultimately the prosecutor's response will come in the form of an indictment or information or else the investigation will have ended and his speech will be unrestricted. We conclude that Rule 1.07(b) and DR 7-107(A) could be used as a presumption of a serious and imminent threat, but only as to attorneys associated with the investigation on behalf of the Government.

V

Local Rule 1.07(c) and DR 7-107(B) and (C) regulate comments by attorneys during the time from arrest or the filing

of charges to commencement of trial or disposition without trial. Comments on six subjects are prohibited. Some general views concerning all six are necessary. There are areas in which "legitimate" reasons exist for attorneys' comment during a criminal case. The most important of these is in regard to an attorney's opinions and arguments about the unconstitutionality or injustice of a statute or rule. During the course of a criminal proceeding an attorney would be in a unique position to examine and criticize such legislation. Again there is the importance of the time factor in terms of gaining the public's attention. Ideally, we would want such views expressed in the abstract without reference to the particular case that is pending. Practically, it may not always be possible to differentiate the two. Still, we should recognize the importance of such criticism.

Other types of comment deserve mention. The particulars of a case might be deemed a necessary subject of public commentary in certain instances. As we said earlier, there is a societal interest in having the discretion of the prosecutor's office reviewed.[11] This interest still exists after the presentation of formal charges, but the countervailing factors are different. The possibility of prejudice is more concrete. There is also an interest in preventing the appearance that the merits of a particular pending prosecution are being tried in the press. A formal controversy that should be settled by the courts is in existence. The balance swings more toward the necessity of prohibiting certain speech at this stage in the criminal judicial process.

One final reason a conscientious attorney might wish "to take his case to the public" is to solicit defense funds. This type of solicitation is a legitimate function. But again it is countered by the factors just discussed. Moreover, our present

11. Such public criticism may be particularly vital when "political dissidents" have been indicted. *See* Comment, *Silence Orders—Preserving Political Expression by Defendants and Their Lawyers*, 6 Harv. Civ. Rights—Civ. Lib. L. Rev. 595 (1971).

judicial system has its own solutions for the problem of the defendant without funds.

Cognizant of these considerations, the specifics of DR 7-107(B) can be examined. The provisions of DR 7-107(C) which relate to what may be announced are irrelevant to our discussion except insofar as they limit the restrictions of DR 7-107(B).[12] (Local Rule 1.07(c) is substantially the same as DR 7-107(B) and (C).)

DR 7-107(B)(1) prohibits communication concerning "character, reputation, or prior criminal record." The possible prejudicial effect of negative comments on such matters is self-evident. Yet supportive statements by defense counsel can also be prejudicial since the Government is entitled to a fair trial and all opinion as to good character and reputation is not admissible evidence. Still, as we indicated earlier, it can be argued that whereas this restriction is proper for prosecutors it should not apply to defense counsel. The prosecutor has in a sense made his "statement" by the filing of an information or indictment. An accused would arguably want his attorney to "defend" his name in public.[13] But the issue that would be involved in such a "defense" is the very issue to be decided at trial. The public's conclusion should be based on the trier of fact's conclusion rather than vice versa. We conclude that the no-comment restriction embodied in DR 7-107(B)(1) would be constitutionally permissible if subject to the standards formulated in Parts I and III of this opinion.

DR 7-107(B)(2) prohibits comment on the possibility of a plea of guilty. Such comment, obviously inadmissible at trial, could be highly prejudicial. Although the public may have a

12. It seems anomalous that DR 7-107(C)(7) allows public disclosure of physical evidence seized, since one apparent policy of DR 7-107(B) is to prevent comment about matters that might be inadmissible. There is always the possibility, that the evidence seized may be suppressed on constitutional grounds.

13. DR 7-107(C)(11) does allow an attorney to publicly state that his client denies the charges brought against him.

legitimate interest in a discussion of the use of plea bargaining by the prosecutors, sufficient information is available when pleas are actually entered. Certainly this tenuous relationship would not invalidate this provision given the lack of any other need for this type of comment.

DR 7-107(B)(3) prevents comments relative to confessions or statements by the accused. Disclosures concerning such matters are fraught with almost incurable prejudice. They could infringe on a defendant's Fifth Amendment privilege. In view of the natural tendency to draw an adverse inference from the assertion of the privilege and the careful attempts to avoid comment about such a choice during a trial, it seems that courts at least can require that attorneys who publicly discuss such matters must prove that their comment was not of the type that poses a serious and imminent threat of interference with a fair trial. Also, confessions or statements may ultimately be suppressed. The judicial system, in this context, has the right to expect that its own officers will not make public that which should not reach a juror. We conclude that there is no overriding purpose in allowing such comment and that it could be identified as a presumptively prohibited subject.

DR 7-107(B)(4) applies to results of examinations or tests or refusal to take them. Here again much of what just has been said is applicable: highly prejudicial material; possible involvement of constitutional rights; narrow restrictions limited to facts of defendant's case; and little chance of infringement on communication relating to an important public concern. This provision, with the proper standard, would not violate the First Amendment.

The fifth category of prohibited comment, DR 7-107(B)(5), involves "identity, testimony or credibility of a prospective witness." It might be argued that there is an overbreadth problem in using the term "prospective witness." We assume, however, that this provision is meant to apply to statements about persons in their role as potential witnesses. Viewing the entire provision

we again find a narrow prohibition concerning a potentially prejudicial subject related almost exclusively to the particular case at issue. The need to provide a fair and unbiased trial could justify this type of limitation if subjected to the proper standards formulated in Parts I and III.

The final restrictive clause, DR 7-107(B)(6), is the broadest and most troublesome. It encompasses "[a]ny opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case." It is important to note that the provision refers exclusively to "opinion" of the attorney and thus should be given special scrutiny. The prohibition on opinion as to guilt or innocence is permissible since this is a traditional ethical requirement in the legal profession and such an opinion could never properly be offered in court. The attorney is allowed to state that the accused denies the charges. Opinions on "the evidence" could not be offered without either giving information about the evidence or an opinion as to guilt or innocence. These are personal opinions related only to the specific case and they too can be deemed a proper area for application of the presumption. The provision that causes us the most concern is the prohibition on opinions as to "the merits of the case." We are not sure what is encompassed by the term "merits." Arguably a general statement that an attorney believes a statute is unjust is an opinion on the merits of a pending case if his client is charged with violating that criminal provision. The same might be true for a general comment regarding court rules or procedure. But, as already discussed, these are the type of comments, if they are made abstractly, that should not be restricted. If a gloss on the word "merits" reflecting our concern was explicitly incorporated in a properly drawn rule we think this term could properly be used within a rule constituting a presumption of a serious and imminent threat.

VI

Comment during the selection of a jury or during trial is governed by one general provision. DR 7-107(D) prohibits comment "that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial." Rule 1.07(d) mentions only trial, parties, or issues and does not include "or other matters."

Both formulations constitute a broad prohibition. On the other hand the time frame is a special one. The period of time in which the restriction is in effect is relatively limited even in the case of a lengthy trial. More important, it is the stage in which there is likely to be the most intense news coverage and which therefore creates the most need to ensure that inadmissible opinions or statements do not encroach upon the laboratory conditions of the trial. A provision such as Local Rule 1.07(d) can be the basis for a presumption if the appropriate serious and imminent standard were to be incorporated.

There is, however, a serious vagueness problem associated with the phrase "or other matters" employed in DR 7-107(D). We have trouble envisioning matters relating to something other than the trial, parties, or issues that could pose a serious and imminent threat of interference with a fair trial. We do not think that attorneys should be faced with considering whether a comment on any "other matter" could pose a serious and imminent threat. This portion of DR 7-107(D) is unconstitutionally vague.

There are two other contentions of plaintiffs that should be discussed. The first is that this section could never be used as a presumption of a serious and imminent threat unless it provides an exception for cases in which there is a sequestered jury. The argument is that there would be no need for a restriction because public statements would not reach the triers of fact. But this view assumes that a trial judge will never change his mind and release a sequestered jury. Then, there is always the possibility that an unedited newspaper or broadcast might

reach even a sequestered juror. Given that counsel can always request that the provisions of a rule be relaxed in a specific case, we find no overbreadth problem in this regard.

Plaintiffs also urge that the rule could not constitutionally apply in cases of bench trials.[14] The issue is whether attorneys' out-of-court comment could ever be presumptively said to pose a serious and imminent threat of interference with a fair trial when the trier of fact is a life-tenured judge. Plaintiffs point to language in the general contempt power cases such as that in *Craig* v. *Harney*, 331 U. S. 367, 376, 67 S. Ct. 1249, 1255, 91 L. Ed. 1546 (1947): "But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." Defendants counter with language contained in *Cox* v. *Louisiana*, 379 U. S. 559, 565, 85 S. Ct. 476, 481, 13 L. Ed. 2d 487 (1965):

> It is, of course, true that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial. A State may also properly protect the judicial process from being misjudged in the minds of the public. Suppose demonstrators paraded and picketed for weeks with signs asking that indictments be dismissed, and that a judge, completely uninfluenced by these demonstrations, dismissed the indictments. A State may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process.

As plaintiffs argue, *Cox* involved expression mixed with conduct rather than pure speech and this was one of the bases upon which

14. This argument would not be applicable to the rules concerning the earlier stages of the criminal process because it usually is not known for sure until the time of trial whether there will be a jury involved.

the Supreme Court distinguished the general contempt cases. The Court, however, also drew the distinction that *Cox* concerned a statute proscribing specific behavior, namely, picketing with intent to interfere with the administration of justice near a courthouse. Here we are reviewing rules, legislative in character, that also proscribe specific conduct, though in broader terms. We conclude that both the contempt cases and *Cox* are relevant, though not dispositive on this issue.

The factor that we find important is the possibility that improper or prejudicial material will reach the trier of fact only by way of extrajudicial comment. It is true, of course, that such matter often comes to the attention of a judge during a bench trial since he must still rule on admissibility, and we must assume that he can reach his verdict only on the basis of the admissible evidence. This does not mean, however, that we can overlook the fact that this is a difficult task, for "judges are human." If prejudicial material can be kept from ever coming to the attention of a judge a potential benefit is derived. It is a benefit that could justify the applicability of rules to bench trials. Unlike the general contempt power cases there is more involved here than merely insulating judges from public opinion based on certain known facts. We agree that life tenure is sufficient for this purpose. Properly drawn rules can perhaps prevent the necessity of a judge attempting to remove from his mind information that should not be considered. Also, the rule can prevent the appearance of decisions based on improper evidence—though we do not think this factor delineated by *Cox* is determinative. We hold therefore that there should be no distinction between bench trials and jury trials.

VII

The final provision relating to criminal proceedings, DR 7-107(E), prohibits any comment during the period between completion of trial and sentencing that is "reasonably likely to affect the imposition of sentence." Plaintiffs' attack on this

section is again premised on the concept that insulation of a judge from outside statements is not a sufficient necessity to justify this imposition on speech even if the provision incorporated a serious and imminent threat standard. In reference to this provision we concur with plaintiffs' contention.

Unlike the prohibition on comment during a bench trial, there is very little possibility that any factual matter that could not be presented in court would be communicated to the judge by way of extra-judicial comment of attorneys. This is because a judge is entitled to consider almost any factor in exercising his sentencing discretion. He may conduct an inquiry "largely unlimited either as to the kind of information he may consider, or the sources from which it may come." *United States* v. *Tucker*, 404 U. S. 443, 446, 92 S. Ct. 589, 591, 30 L. Ed. 2d 592 (1972). *See also Williams* v. *New York*, 337 U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).

The justification for a no-comment rule during this stage of the criminal process must be that judges should have an opportunity to arrive at an appropriate sentence free of public pressure. The assumption is that lawyers' statements could initiate or increase such pressure. We think it clear, however, that this consideration is not of sufficient magnitude to authorize this restriction in the case of life-tenured federal judges. We read the Supreme Court general contempt cases as indicating that the First Amendment does not authorize restrictions on "pure speech" merely for the purpose of protecting judges from criticism. *E. g. Bridges* v. *California*, 314 U. S. 252, 273, 62 S. Ct. 190, 86 L. Ed. 192 (1941). We therefore hold that comment restricted by Rule 1.07(e) and DR 7-107(E) could never be deemed a serious and imminent threat of interference with the fair administration of justice.

VIII

Although all of the previously mentioned literature considered only the "fair trial-free press" issue in regard to criminal cases, we are also presented with the task of evaluating no-

comment rules applicable to attorneys associated with civil actions. Local Rule 1.07 is limited to criminal matters, but DR 7-107(G) is a specific provision for all stages of civil litigation and is incorporated by Local General Rule 8.

Again some preliminary observations are necessary. In the context of these restrictions on attorneys' comment it is important to note particular distinctions between civil and criminal litigation. First, we should recognize that although we rightfully place a prime value on providing a system of impartial justice to settle civil disputes, we require even a greater insularity against the possibility of interference with fairness in criminal cases. Perhaps this is symbolically reflected in the Sixth Amendment's requirement of an "impartial jury" in criminal cases whereas the Seventh Amendment guarantees only "trial by jury" in civil cases. The point to be made is that the mere invocation of the phrase "fair trial" does not as readily justify a restriction on speech when we are referring to civil trials.

Another vital factor is the length of civil litigation. Normally, civil litigation will be more prolonged than criminal litigation. One reason is that priority is afforded criminal matters because of the constitutional right to a speedy trial. Also, our civil rules allow much more discovery than our criminal rules. A civil case may last for years just in the discovery stage. DR 7-107(G) is not geared to specific time frames. It provides for blanket coverage of the period of "investigation or litigation." We are not sure of the parameters of an "investigation" of a civil matter, but given rather lengthy statutes of limitations we assume that there might be a restriction on speech for many years before a complaint is even filed. And the use of the general term "litigation" implies that attorneys' comments are also proscribed while a case is on appeal. The criminal no-comment rules contain no restrictions on statements made after sentencing. It is clear that DR 7-107(G) cannot be deemed a prohibition on speech that applies only for a limited period. Restrictions for many years are quite possible. Therefore, the broad time span of this rule

relating to civil matters is an influential factor weighing against its constitutionality.

Finally, there is the element of the nature of certain civil litigation. As plaintiffs indicate, in our present society many important social issues became entangled to some degree in civil litigation. Indeed, certain civil suits may be instigated for the very purpose of gaining information for the public. Often actions are brought on behalf of the public interest on a private attorney general theory. Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public. Yet it is normally only the attorney who will have this knowledge or realize its significance. Sometimes a class of poor or powerless citizens challenges, by way of a civil suit, actions taken by our established private or semi-private institutions or governmental entities. Often non-lawyers can adequately comment publicly on behalf of these institutions or governmental entities. The lawyer representing the class plaintiffs may be the only articulate voice for that side of the case. Therefore, we should be extremely skeptical about any rule that silences that voice.

Viewing the five general areas of proscribed comment relating to civil litigation, we hold that individually and collectively they would be constitutionally impermissible if deemed presumptively prohibited. The first section of the rule prevents any public statements concerning the evidence regarding the matters in the case. Such a broad restriction might prevent an attorney from informing the public about the government's manner of performing certain tasks since testimony about these practices would probably be relevant evidence. For instance, in an airplane crash case an attorney who discovered that unsafe flight procedures were in effect and were being condoned by government regulatory agencies could not impart this vital knowledge to the public because it almost certainly would also constitute a part of his evidence. The performance or results of tests which cannot be the subject of public comment by reason of

DR 7-107(G)(3) also may contain such crucial information. The need for informed and complete discussion of this type of issue far outweighs any possible benefit that might accrue in terms of maintaining the laboratory conditions of a civil trial.

Arguably, the most defensible portion of this civil rule is DR 7-107(G)(2) which restricts comment concerning the "character, credibility, or criminal record of a party, witness or prospective witness." On balance, we do not think even this limited aspect of the rule should stand. Usually there would be little need or ethical justification for statements in this vein. At times, however, comments of this type might be appropriate. Statements and actions of public officials are often involved in civil lawsuits and may be the impetus for suits. The public has a legitimate interest in the character and credibility of both elected and appointed officials. Attorneys involved in certain litigation may have a unique opportunity to evaluate the public statements made by officials. We think they should be allowed to offer their opinions and the bases for them without having to await the completion of lengthy litigation. Some remote possibility of our being unable to ensure an impartial trial is simply not a sufficient countervailing factor.

The fourth prohibition in the rule relates to an "opinion as to the merits of the claims or defenses of a party." This provision is so broad that it covers legal issues. Thus, an attorney involved in a case could not even write a law review article concerning any aspect of the matter. And if the case is one involving "public policy considerations" the attorney could not offer his views on the social issue. Yet his involvement in the suit would show his interest in and familiarity with the question. An informed viewpoint would be removed from the public forum without justification. We can envision little benefit from this prohibition and find that as drawn it would conflict with the very purpose of the First Amendment.

Finally, we have the catchall provision proscribing public comment on "[a]ny other matter reasonably likely to interfere

with a fair trial of the action." This vague provision could not stand even with the substitution of what we have declared to be the correct standard. Its chilling effect is obvious. If some restriction is necessary in a particular case then perhaps a specific order can be entered supported by a record showing its necessity and the unavailability of a narrower restriction. We need not decide that issue here. We do recognize the great benefits derived from allowing uninhibited comment by knowledgeable attorneys involved in civil litigation. This is the same type of recognition embodied in the First Amendment.

The judgment of the district court is reversed and the cause is remanded for entry of appropriate relief in accordance with this opinion.

WYZANSKI, *Senior District Judge*, concurring:

Judge Swygert's thorough opinion, prepared after full review of the authorities and mature consideration of basic principles and supposititious cases, commands my respect. Yet the nature of this proceeding raises questions whether as a matter of discretion it is consistent with the *prudent* exercise of discretionary judicial power under Article III of the United States Constitution, under the Declaratory Judgment Act, and under other statutes conferring jurisdiction upon the federal courts, for this court to pass judgment upon imaginary cases sometimes scorned as "a parade of horribles."

This action seeks injunctive and declaratory relief with respect to the constitutionality of virtually every provision of the complex, lengthy provisions of Rule 1.07 of the Local Criminal Rules adopted by the United States District Court for the Northern District of Illinois, and of so much of that same Court's Local General Rule 8 (applicable to civil cases) as is derived from Disciplinary Rule 7-107 of the American Bar Association's Code of Professional Responsibility. In general, plaintiffs complain that the rules cited are so vague and over-

broad as to deny the due process of law guaranteed by the Fifth Amendment to the Constitution, the freedom of speech guaranteed by the First Amendment, and other constitutional guarantees implicit in Article III and the Fifth and Sixth Amendments.

It is plain that the complaint is not frivolous. Without pausing to underline the careful critique in Judge Swygert's detailed analysis, there are provisions which indubitably deny or chill the exercise by lawyers of some recognized constitutional rights fundamental to civic and professional privileges, duties, and interests. An attempt by a court to enforce some of these restrictions would be unconstitutional, and if plaintiffs are to be fully protected with respect to those rights it is appropriate that they be judicially vindicated promptly without leaving plaintiffs to act at their peril.

Yet this action invites, in advance of a specific invocation of any rule in the form of a disciplinary or punitive action, a scrutiny of all the complex provisions of a total code of professional conduct in a broad branch of the profession of advocacy. This code has been adapted from drafts prepared after prolonged, highly competent work by professional committees of judges and lawyers of distinction and experience. They, like ourselves, of course, may have erred. They, like ourselves, were acting not in relation to immediate controversies, arising out of actual conflict, but in relation to hypothetical cases which they foresaw or feared.

In short, those committees, like the District Court, were exercising a quasi-legislative function.

It might have been proper and preferable for the Circuit Council of this Seventh Circuit to have reviewed in a like *legislative* manner those or any other rules of the District Court for the Northern District of Illinois. But that is not the nature of this proceeding. Here we have what purports to be an Article III "case" or "controversy." We are asked to make an adjudication. That adjudication will constitute a precedent and may have other binding consequences. Yet inasmuch as it is not addressed

to specific, concrete facts it also partakes of the nature of an advisory opinion with all the dangers inherent in such speculative judgments.

Of course the advisory and sweeping aspects of the opinion do not imply that the case is beyond our judicial *power* under Article III or any other provision of the Constitution, or under the provisions of the Declaratory Judgment Act, or under the governing principles for the exercise of equity jurisdiction.

Yet there is ground for us to weigh carefully the good sense and wisdom of our exercising our discretion whether to render a judgment upon the questions presented when we, like those who drafted the rules, are necessarily relying more on imagination than on a factual record.

It might be prudent to decline, as a matter of discretion, to deliver an opinion or to enter a judgment detailing our views on the difficult constitutional matters presented, on which perhaps we are not better qualified than the original draftsmen. We might wait for the harvest to discern the wheat and the tares.

Yet, after mature deliberation, I am content to concur in the admirable opinion of Judge Swygert, although I think it may be desirable to state the reasons that induce my concurrence.

Freedom of speech, particularly in the area of professional responsibility, is a prized value in our society. The restraints upon that freedom which are embodied in these rules, unless they are constitutionally valid, would gravely affect justice. To remit those who are faced with unconstitutional restraints solely to litigation *after* they had acted would impair their liberties, chill freedom of expression, and sacrifice important public interests. Judge Swygert's opinion convincingly demonstrates that those are not fanciful dangers.

I have no doubt that in each and every instance where Judge Swygert's opinion condemns as unconstitutional a specific provision of the rules his judgment is sound.

Perhaps I am less clear that those provisions of the rules which pass muster in Judge Swygert's discriminating and thought-

ful opinion would be certain to be upheld in a later case which arose upon a record of concrete conflict which had occurred in a specific instance. But if at a later date a state of facts does further illumine an issue, this declaratory judgment ought not to be regarded as an indistinguishable precedent nor an insurmountable obstacle.

Furthermore, I am not unmindful that, particularly since other courts are now wrestling with the issues here invoked—see, for example, the litigation in the New York state courts to which reference is made in the July 13, 1975 *New York Times* —it would probably be helpful to other judges, as it has been to me, and presumably to the bar and bench of this Circuit, to have published the penetrating and persuasive analysis prepared by Judge Swygert. Hence I concur in his opinion.

CASTLE, *Senior Circuit Judge,* dissenting in part.

It is apparent from a reading of the District Court's Local Criminal Rule 1.07 that 1.07(a) is designed to state generally the *duty* of counsel in connection with extrajudicial comment concerning criminal litigation with which he is associated, and that the remaining subdivisions of the Rule (1.07(b)—1.07(e)) are intended to proscribe, within the applicable time frame designated in each, comment concerning particular subject matter which constitutes a *breach* of that duty.

I dissent from the majority opinion insofar as it may be taken as requiring as a condition to the constitutional validity of Rule 1.07 that the element of "reasonable likelihood" be eliminated from the standard which is to govern and measure counsel's duty in the premises. It is my view that the overbreadth of Rule 1.07 lies only in its proscription of any comment which "will interfere" with a fair trial or "otherwise prejudice" the due administration of justice without regard to whether the interference or prejudice is both serious and imminent. Thus, I agree with the majority that to satisfy First Amendment rights of counsel the Rule must additionally incorporate both the elements of seriousness and imminence. Merely trivial, insubstantial interference or prejudice, or a remote possibility of interference or prejudice, is not sufficient to justify proscription. But comment which, if publicly disseminated,[1] would produce a "reasonable likelihood" of serious and imminent interference with or prejudice to a fair trial or the due administration of justice is subject to proscription. And, from my understanding of the relevant decisions, I find no First Amendment or other constitutional basis for requiring that the District Court be limited in its mode of expressing the governing standard to a parroting of the "poses a serious and imminent threat" phraseology this Court saw fit to employ in the *Chase* v. *Robson* and *In re Oliver* opinions cited by the majority. In the context here involved a "reasonable likelihood" of resulting serious and imminent interference or prejudice is certainly a standard equally as definite as "poses a serious and imminent threat" of interference or prejudice.

A rule incorporating the "reasonable likelihood" element as well as the "serious and imminent" factors is well within the scope of remedy advocated in *Sheppard* v. *Maxwell,* 384 U. S. 333, 363, 86 S. Ct. 1507, 1522, 16 L. Ed. 2d 600, where the Court, after declaring that "the trial courts must take strong measures," pointed out:

> ". . . reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take steps by rule and regulation that will protect their processes from prejudicial outside interference."

(Appendix A and Appendix B to the Opinion are omitted. They are set forth at pp. 6-8 and 9-12 of the Petition.)

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1. Rule 1.07, in this respect, is expressly confined to extrajudicial comment which "a reasonable person would expect to be disseminated by means of public communication."

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 16, 1975.

Before

HON. LATHAM CASTLE, *Senior Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. CHARLES E. WYZANSKI, JR., *Senior District Judge**

CHICAGO COUNCIL OF LAWYERS, et al., *Plaintiffs-Appellants,* No. 74-1305 *vs.* WILLIAM J. BAUER, et al., *Defendants-Appellees,* and TERENCE MACCARTHY, et al., *Intervenors-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 70 C 2194 Executive Committee for the Northern District of Illinois.

On consideration of the petition for rehearing filed by counsel for defendant-appellee H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois,

IT IS ORDERED that said petition be, and the same is hereby DENIED.

* The Honorable Charles E. Wyzanski, Jr., United States Senior District Judge for the District of Massachusetts at Boston, sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 16, 1975.

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*

CHICAGO COUNCIL OF LAWYERS, et al., *Plaintiffs-Appellants,* No. 74-1305 *vs.* WILLIAM J. BAUER, et al., *Defendants-Appellees,* and TERENCE MACCARTHY, et al., *Intervenors-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 70 C 2194 Executive Committee for the Northern District of Illinois.

Defendant-appellee H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois, filed a suggestion that this appeal be reheard by the court *en banc*. On consideration of the suggestion that this appeal be reheard

en banc and a vote on the suggestion having been called for, a majority of the judges in regular active service not having voted to grant the rehearing.

IT IS THEREFORE ORDERED that the petition for rehearing *en banc* be, and the same is hereby DENIED.

(JUDGES FAIRCHILD, PELL, STEVENS and TONE voted to grant said petition for rehearing *en banc*. JUDGE BAUER disqualified himself from participation in the matter.)

OPINION OF THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

No. 70 C 2194

CHICAGO COUNCIL OF LAWYERS, et al.,

Plaintiffs,

vs.

WILLIAM J. BAUER, et al.,

Defendants.

MEMORANDUM AND ORDER ON DEFENDANTS' AND INTERVENORS' MOTIONS

The Chicago Council of Lawyers, an association of local lawyers, and seven of its attorney members have filed this action for declaratory judgment and injunction seeking a finding that Rule 1.07 of the Local Criminal Rules of this court and Disciplinary Rule DR 7-107 of the American Bar Association Code of Professional Responsibility (collectively referred to as the no-comment rules) are facially unconstitutional as violative of the plaintiffs' first amendment rights.[1] The no-comment rules prohibit the release of information by counsel in connection with pending criminal jury cases, "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice." Local Rule 1.07(a). A. B. A. Disciplinary Rule DR 7-107(G) extends these principles to civil cases.[2]

1. The plaintiffs allege that Local Rule 8 and the November, 1965 Policy Statement issued by the judges of this court are intended to incorporate the A. B. A. Disciplinary Rules. For purposes of this memorandum, the court will assume *arguendo* that this interpretation is correct.

2. The "reasonable likelihood" standard, adopted in Section (a) of Local Rule 1.07, clearly applies to all succeeding paragraphs. Section (a) was expressly intended to state the broad principle

The complaint has two counts: Count I is on behalf of plaintiffs individually while Count II is a purported class action brought on behalf of all similarly situated attorneys. Certain criminal defense lawyers were granted leave to intervene and presently have before the court a motion to have themselves declared the proper representatives of the subclass of attorneys defending criminal cases. Both the intervenors and the defendants have moved to dismiss for failure to state a claim upon which relief can be granted.[3] For the reasons herein stated, the court grants the motions of intervenors and defendants to dismiss. In light of this disposition, the procedural questions raised by the intervenors need not be reached.

[1] A fundamental tenet of our system of justice is "that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence . . ." Patterson v. Colorado, 205 U. S. 454, 462, 27 S. Ct. 556, 558, 51 L. Ed. 879 (1907). The right to a fair and impartial adjudication extends not only to criminal defendants but also to the government and, through it, to society. *Cf.* Williams v. Florida, 399 U. S. 78, 82, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970); North Carolina v. Pearce, 395 U. S. 711, 721 n. 18, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); United States v. Tijerina, 412 F. 2d 661, 666 (10th Cir.), cert. den., 396 U. S. 990, 90 S. Ct. 478, 24 L. Ed. 2d 452 (1969); State v. Kavanaugh, 52 N. J. 7, 243 A. 2d 225, 231 (1968). Yet, in recent years, it has become increasingly evident that this fundamental right has been seriously threatened by excessive and prejudicial publicity.

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underlying the specific restrictions contained in Sections (b) through (e). Likewise, the standard was clearly the underlying theory upon which the A. B. A. Disciplinary Rules were promulgated. Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Crminal Justice, Standards Relating to Fair Trial and Free Press, 84-85, Tentative Draft (1966).

3. The American Bar Association, as amicus curiae, has submitted a brief in support of the motions to dismiss.

Against this background, the Supreme Court in Sheppard v. Maxwell, 384 U. S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1961), directed district courts to seek an accommodation between the competing constitutional guarantees of fair trial and free speech. In clear and unequivocal language, the Court declared:

> "The courts *must* take such steps by *rule and regulation* that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only *subject to regulation, but is highly censurable and worthy of disciplinary measures.*" (Emphasis added.) 384 U. S. 363, 86 S. Ct. 1522.

With respect to extrajudicial disclosures by counsel, the Court was quite explicit:

> "More specifically, *the trial court might well have proscribed extrajudicial statements by any lawyer,* party, witness, or court official *which divulged prejudicial matters,* such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." (Emphasis added.) 384 U. S. 361, 86 S. Ct. 1521.

The efforts of the courts and the bar to implement these mandated directives culminated in the adoption of the currently challenged rules.[4]

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4. The *Sheppard* decision generated a series of major studies designed to develop a practical solution to the fair trial-free speech dilemma. Among the most significant were: (1) Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press—Tentative Draft (1966), Approved Draft (1968) [hereinafter cited as the Reardon Report]; (2) Committee on the Operation of the Jury System, Judicial Conference of the United States, Report of the Committee on the Operation of the Jury System on

I. *Criminal Jury Trials*

The plaintiffs contend that there are four respects in which the no-comment rules, as applied to criminal jury trials, exceed the minimum restraint required to assure a fair and impartial jury trial and are thus facially unconstitutional.

[2] Plaintiffs first argue that the failure of the rules to provide for the employment of traditional protective devices, in lieu of partially silencing attorneys, renders them unconstitutional.[5] Initially, it must be remembered that such devices, unlike the challenged rules, are not preventive measures, but merely attempts to overcome the effects of prejudicial publicity once it has occurred. As the court in *Sheppard* was careful to point out, "the cure lies in those remedial measures that will *prevent* the prejudice at its inception." (Emphasis added.) 384 U. S. 333, 363, 86 S. Ct. 1522.

Measured against the no-comment rules, these traditional techniques are clearly inadequate. Continuances, of course, are in conflict with the Sixth Amendment guarantee of a speedy

the "Free Press-Fair Trial" Issue (Sept., 1968), reported in 45 F. R. D. 391 [hereinafter cited as the Kaufman Report]; (3) Association of the Bar of the City of New York, Special Committee on Radio, Television, and the Administration of Justice, Freedom of the Press and Fair Trial, Final Report with Recommendations (1967) [hereinafter cited as the Medina Report].

This court has found the recommendations of the Kaufman Report to be particularly persuasive. The report was prepared by a committee of 12 federal court judges, chaired by Judge Edward T. Gignoux of Maine, and was ultimately adopted by the Judicial Conference of the United States. In it, the committee specifically recommended the implementation of local court rules designed to control the release of prejudicial information by attorneys on penalty of disciplinary action. 45 F. R. D. 401. In substantial portion, Local Rule 1.07 was drawn verbatim from the suggested rules prepared by the committee. It is especially significant that, after circulating the report to all federal judges, the committee reported that, "[t]he individual and collective opinions of federal judges . . . overwhelming reflected general satisfaction with all recommendations of the report". 45 F. R. D. 400.

5. Traditional protective devices include continuances, changes of venue, cautionary instructions and sequestration.

trial. Changes of venue compel defendants to sacrifice their constitutional right to trial in the locale in which the crime took place. Further, neither these devices nor cautionary instructions can negate the effect of prejudicial publicity once it has permeated the proceedings. Sequestration of the jury is equally inadequate. If it is ordered because of the jurors' exposure to prejudicial publicity before trial, irremediable damage may have already been done. Sequestration is generally viewed as an undesirable last resort by defense counsel (Intervenors' Br. 24) and may itself prejudice the defendant because of the inconvenience and annoyance it causes jurors. It should not be invoked merely to permit attorneys to disseminate prejudicial publicity. *See* Reardon Report, 73-76.

[3] Plantiffs next contend that the rules are unconstitutionally overbroad because they fail to draw any distinction between comments favorable to the criminal defendant and those which are hostile. Admittedly, the publicity problem in the main has been one of prosecutorial excesses. Reardon Report, 37, 42-43. However, this does not permit the court to assume that defense counsel's comments would be non-prejudicial to the prosecution even though merely favorable to the defendant. Indeed, the report of a New York City Bar Association committee, chaired by Judge Harold R. Medina, indicated that it is not uncommon for defense counsel to actively generate publicity which may taint the impartiality of a tribunal. *See* Medina Report, 43-55; Reardon Report, 42-43. 175; United States ex rel. Bloeth v. Denno, 313 F. 2d 364, 378-379 (2nd Cir.) (dissent), cert. den., 372 U. S. 978, 83 S. Ct. 1112, 10 L. Ed. 2d 143 (1963); Sheppard v. Maxwell, *supra*, 384 U. S. 361, 86 S. Ct. 1507. The adoption of the onesided approach urged by the plaintiffs would ignore the correlative interest of society in a fair trial. Any limitation of prejudicial comment should apply to any attorney bent on securing improper advantage. State v. Van Duyne, 43 N. J. 369, 204 A. 2d 841, cert. den., 380 U. S. 987, 85 S. Ct. 1359, 14 L. Ed. 2d 279 (1969); State v. Kavanaugh, *supra*.

[4] Plaintiffs' third objection is that the rules constitute a "prior restraint" of first amendment rights and must be judged accordingly. *See* Organization for a Better Austin v. Keefe, 402 U. S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971); New York Times Co. v. United States, 403 U. S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971). However, unlike the cited cases, the instant situation does not impose a blanket prohibition on all speech irrespective of content. Rather, the challenged rules seek only to punish speech from which prejudice is reasonably likely to result. They impose a responsibility on those who violate them as do the laws on slander, libel and obscenity. The rules are therefore clearly not a prior restraint.

Finally, plaintiffs attack the rules on the ground that they are not predicated upon a "clear and present danger" of prejudicial effect, but rather employ the lesser standard of "reasonable likelihood." In support of this proposition, they cite Bridges v. California, 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941), Pennekamp v. Florida, 328 U. S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295 (1946), Craig v. Harney, 331 U. S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947), and Wood v. Georgia, 370 U. S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962). It is the opinion of this court that neither the Constitution nor the cited case law supports plaintiffs' conclusion.

[5] *Bridges* and its progeny are more accurately cited for the proposition that, where no "judicial proceeding [is] pending," the First Amendment rights of the press and private citizens cannot be proscribed by court order without a serious and imminent threat to the administration of justice. Bridges v. California, *supra*, 314 U. S. at 263, 62 S. Ct. 190. This court, however, cannot accept the notion that these principles must be extended to lawyers participating in ongoing litigation.

Additionally, this court takes cognizance of significant factual differences which distinguish the *Bridges-Wood* line of decisions from the situation now before the court. Each of the cases cited by the plaintiffs was concerned with defining the permissible

scope of the contempt power, "a common law concept of the most general and undefined nature." Bridges v. California, *supra*, 314 U. S. at 260, 62 S. Ct. at 192. None dealt with the violation of a narrowly drawn statute or court rule which seeks to accommodate competing constitutional interests.

The Supreme Court has made it abundantly clear that review of contempt convictions will differ drastically from review of statutory violations, where the need for regulation has been buttressed by prior legislative deliberations. Bridges v. California, *supra*, 314 U. S. at 260-261, 62 S. Ct. 190; Wood v. Georgia, *supra*, 370 U. S. at 386, 82 S. Ct. 1364. In the later situation, great deference is accorded to the judgment of the legislature. *See, e.g.*, Dennis v. United States, 341 U. S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951); Barenblatt v. United States, 360 U. S. 109, 79 S. Ct. 1081, 3 L. Ed. 2d 1115 (1959). In view of the extensive deliberations which preceded the promulgation of the challenged rules, see footnote 4, *supra*, it is evident that they must be judged by standards analogous to those applied to legislative action. Thus, having reached the court "encased in the armour wrought by prior legislative deliberation," Bridges v. California, *supra* 314 U. S. at 261, 62 S. Ct. at 193, these rules should not be overturned lightly.

Perhaps the most effective distinction may be drawn from the language of *Wood* itself. There, as in *Bridges*, *Pennekamp*, and *Craig*, the Court was dealing with hostile remarks directed at judges or the general administration of justice. This must be distinguished from the situation where the communication might prejudice a pending trial. The court noted at 370 U. S. pp. 389-390, 82 S. Ct. p. 1372:

> "[I]t is important to emphasize that this case does not represent a situation where an individual is on trial; there was no 'judicial proceeding pending' in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding. . . . Moreover, we need

not pause here to consider the variant factors that would be present in a case involving a petit jury. *Neither Bridges, Pennekamp nor Harney involved a trial by jury.* In Bridges it was noted that 'trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper' (314 U.S., at 271 [62 S.Ct. at 197]), *and of course the limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation.*" (Emphasis added.)

In In Re Sawyer, 360 U. S. 622, 79 S. Ct. 1376, 3 L. Ed. 2d 1473 (1959), the Supreme Court was confronted with a problem similar to the one present here. During the pendency of a criminal case, one of the trial counsel made a public speech construed by the Supreme Court of Hawaii as an attack on the fairness and impartiality of the federal district court judge presiding over the trial. As a result, the Hawaii Supreme Court found Mrs. Sawyer guilty of gross misconduct and suspended her from practice for one year. In a five to four decision, the United States Supreme Court reversed Mrs. Sawyer's suspension, on the ground that the findings upon which the suspension rested were not supported by the evidence. The dissent emphasized the proposition that the First Amendment rights to active trial counsel were significantly less immune from restriction than those of other private citizens or the media.

In the course of his opinion for the dissenters, Justice Frankfurter stated at 668, 79 S. Ct. at 1399:

> "Here was a public meeting addressed by counsel for the defense, haranguing a crowd on the unfairness to the defendant of the proceedings in court, with the high probability indeed almost certainty under modern conditions that the goings-on of the meeting would come to the attention of the presiding judge and the jury. It took place in a case in which public interest and public tempers had been aroused. When the story of the meeting came to the attention of the judge, he felt obliged publicly to defend his conduct. *It is hard to believe that this Court should hold*

> *that a member of the legal profession is constitutionally entitled to remove his case from the court in which he is an officer to the public and press, and express to them his grievances against the conduct of the trial and the judge.* 'Legal trials,' said this Court, 'are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.' [citing *Bridges, supra,* 314 U. S. at p. 271, 62 S. Ct. at p. 197]
>
> *"Even in the absence of the substantial likelihood that what was said at a public gathering would reach the judge or jury, conduct of the kind found here cannot be deemed to be protected by the Constitution.* An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense. He does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition, ultimately this Court, still exercises judicial power those claims will be heard and heeded." (Emphasis added.)

Justice Stewart concurred in the reversal but solely on the basis that the evidence was insufficient. His carefully limited concurrence demonstrates that he agreed with the constitutional principles articulated by Justice Frankfurter:

> "If, as suggested by my Brother Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> *"Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.* (Emphasis added.) 360 U.S. 646, 79 S.Ct. 1388.

[6] When considered together, the views expressed in the dissent and Justice Stewart's concurring opinion at least stand for the proposition that the First Amendment does not immunize trial counsel from discipline for public statements which might affect the fairness of a pending case, see Sheppard v. Maxwell, *supra* 384 U. S. at 363, 86 S. Ct. 1507, and raises substantial doubt as to the viability of the "clear and present danger" test as a measure of protected speech in that context. Neither the "clear and present danger" test nor the rulings in *Bridges*, *Pennekamp*, or *Craig* were intimated as controlling.[6]

Some of these very issues were recently considered in United States v. Tijerina, *supra*. There, the court reviewed a criminal contempt conviction arising from public statements made by defendants in violation of a pre-trial order prohibiting comments by all attorneys and defendants. The defendants asserted that the order was invalid since it was not based upon a clear and present danger to the administration of justice. The Tenth Circuit rejected defendants' argument, stating at 412 F. 2d p. 666:

> "We believe that reasonable likelihood suffices. The Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial."

Accord, In Re Sawyer, 260 F. 2d 189 (9th Cir. 1958), rev'd on other grounds, 360 U. S. 622, 79 S. Ct. 1376, 3 L. Ed. 2d 1473 (1959); State v. Van Duyne, *supra;* Hamilton v. Municipal Court, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168 (1st Dist.), cert. den., 396 U. S. 985, 90 S. Ct. 479, 24 L. Ed. 2d 449 (1969); Kaufman Report, 404-7; Reardon Report, 93.

[7] Accordingly, it is the judgment of this court that a "clear and present danger" to the fair administration of justice is not the required standard to be used in measuring the constitu-

6. Of particular note is Justice Frankfurter's statement that even in the absence of a "substantial likelihood" of court exposure to the declarations, Mrs. Sawyer's conduct remained constitutionally unprotected. *See* Strong, Fifty Years of "Clear and Present Danger"; From Schenck to Brandenberg—and Beyond, 1969 S. Ct. Rev. 41.

tionality of court rules proscribing the dissemination of prejudicial remarks by active trial counsel.

In the final analysis, the right of trial counsel to comment on pending criminal proceedings must be weighed against the right of individual defendants and society to a fair and impartial trial. As the Supreme Court has repeatedly indicated, "the societal value of speech must, on occasion, be subordinated to other values and considerations." Dennis v. United States, *supra*, 341 U. S. 503, 71 S. Ct. 864. In such cases, the court must weigh the individual and societal interest in freedom of expression against the societal interest in the result which the regulation may achieve. *See, e.g.*, Breard v. Alexandria, 341 U. S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951); Dennis v. United States, *supra;* Rowan v. Post Office, 397 U. S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970).

Upon examination of the interests asserted by plaintiffs, this court finds them to be neither compelling nor evident. Initially, it is important to observe that the challenged rules do not establish a blanket prohibition on all speech. Attorneys may quote from or refer to the public record, request assistance in obtaining evidence, release the facts surrounding the time and place of the arrest, as well as announce that the accused denies the charges made against him. A. B. A. Disciplinary Rule DR 7-107(B). Furthermore, it is apparent from even the briefest survey of the situation that the public's right to know is not substantially impaired. *See* Red Lion Broadcasting Co. v. F. C. C., 395 U. S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969). The media, as well as private citizens, remain unrestrained in their ability to comment on pending proceedings. Only the voices of participating attorneys are stilled, and then only if the statements present a reasonable likelihood of prejudicing the judicial process.

Nor can it be contended that participating attorneys have a proper interest in publicly discussing matters not of record that could affect the outcome of the litigation. Any such statements invite the fact finder to weigh these considerations in addition

to or in disregard of the evidence presented at trial. A courtroom "is a place for trial of defined issues in accordance with law and rules of evidence, with standards of demeanor for court, jurors, parties, witnesses and counsel." In Re Dellinger, 461 F. 2d 389, 401 (7th Cir. 1972). The injection of prejudicial remarks would remove justice from its proper forum, to the advantage of those skilled in manipulating the media and the public.

Moreover, in the process of accommodating the fair trial guarantee with other constitutional rights, the Supreme Court has indicated that the former must prevail:

> "We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions. Here the remedy is clear and certain of application and it is our duty to continue to enforce the principles that from time immemorial have proven efficacious and necessary to a fair trial." Estes v. Texas, 381 U. S. 532, 540-541, 85 S. Ct. 1628, 1632, 14 L. Ed. 2d 543 (1965). *See* United States v. Tijerina, *supra.*

[8] Finally, in light of Sheppard v. Maxwell, *supra,* the "reasonable likelihood" standard is mandatory. There, the Supreme Court established the principle that a criminal defendant need only show a probability of prejudicial circumstances to obtain reversal of his conviction. If convictions are to be overturned on a showing that publicity *probably affected* the outcome, attempts by court rule to forestall such prejudice must be judged by the same standard. To adopt a more lenient guideline would allow unprincipled attorneys to frustrate the judicial process with impunity and thus ignore the command of the Supreme Court in *Sheppard* to deal with the problem by "rule and regulation."[7] *See* United States v. Tijerina, *supra;* State v. Van Duyne, *supra;* Hamilton v. Municipal Court, *supra.*

7. Plaintiffs' reliance on Chase v. Robson, 435 F. 2d 1059 (7th Cir. 1970) and In Re Oliver, 452 F. 2d 111 (7th Cir. 1971) is misplaced. In *Chase,* the Seventh Circuit specifically declined to rule on the issue. Similarly, in *Oliver,* the court's decision was premised upon the unconstitutionality of this District's policy statement of November, 1965. No opinion was expressed as to the propriety of the "reasonable likelihood" standard.

II. *Civil Jury Trials*

[9] Plaintiffs argue that A. B. A. Disciplinary Rule DR 7-107(G) is unconstitutionally overbroad because it extends the restraints of the no-comment rules to civil jury cases. Plaintiffs base their contention upon the following reasoning: major social and political issues are likely to find their way into the federal courts; intelligent discourse on these issues is vital to society's interests; attorneys involved in such litigation can make significant contributions to these discussions; thus participating counsel should be unfettered in their discussion of pending civil cases.

Yet, the need for rational resolution of disputes in accordance with the law and rules of evidence is no less compelling in civil litigation than in criminal trials. "The very purpose of a court system is to adjudicate controversies, *both criminal and civil,* in the calmness and solemnity of the courtroom according to legal procedures." (Emphasis added.) Cox. v. Louisiana, 379 U. S. 559, 583-584, 85 S. Ct. 466, 471, 13 L. Ed. 2d 487 (1965) (Black, J., dissenting). Many of the reasons which establish the constitutionality of the no-comment rules as applied to criminal jury trials also support the conclusion that A. B. A. Disciplinary Rule DR 7-107(G) is not overbroad. See Section I, *supra.*[8]

III. *Civil and Criminal Bench Trials*

[10] Finally, plaintiffs argue that the no-comment rules are overbroad because they fail to distinguish between jury and bench trials. Although the need for these restrictions may be more acute in the jury context, and although the challenged rules emanated

8. No weight should be attributed to the failure of the various study committees, *see* note 4 *supra,* to make recommendations concerning civil cases, as such matters were beyond the scope of the committee undertakings.

from abuses arising therein, this does not mean that the possibility for prejudice is non-existent at bench trials. Speaking in an analogous context, the Supreme Court has recognized:

> "that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges . . . and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of trial." Cox v. Louisiana, *supra* at 565, 85 S. Ct. at 481.[9]

IV. *Orders of the Court*

It is therefore ordered that:

1. In view of the following disposition, the Intervenors' motion to have themselves declared the proper representatives of attorneys who regularly represent defendants in criminal cases in this district shall be, and the same is hereby, denied.

2. The Defendants' and Intervenors' motions to dismiss shall be, and the same are hereby, granted.

(s) EDWIN A. ROBSON
(s) RICHARD B. AUSTIN
(s) JAMES B. PARSONS
(s) HUBERT L. WILL
(s) BERNARD M. DECKER
Executive Committee

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9. Justice Frankfurter had earlier noted that out-of-court comment might affect judicial perceptions:

> "A powerful newspaper admonished a judge, who within a year would have to secure popular approval if he desired continuance in office, that failure to comply with its demands would be 'a serious mistake'. . . . If such a sentence had been imposed readers might assume that the court had been influenced in its action; if lesser punishment had been imposed, at least a portion of the community might be stirred to resentment. It cannot be denied that even a judge may be affected by such a quandary." Bridges v. California, *supra* 314 U. S. at 299-300, 62 S. Ct. at 211.

While the tenure of federal judges protects them from electoral ramifications of their decisions, the manner in which a judge views a case may be affected by statements sought to be proscribed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1296

H. STUART CUNNINGHAM, CLERK, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
Petitioner,

vs.

CHICAGO COUNCIL OF LAWYERS, AN ASSOCIATION OF LAWYERS, EDGAR BERNHARD, ELMER GERTZ, CECIL C. BUTLER, WILLARD J. LASSERS, ROBERT PLOTKIN, JOHN H. SCHLEGEL, JOEL J. SPRAYREGEN, SAMUEL K. SKINNER, UNITED STATES ATTORNEY, JOHN J. TWOMEY, UNITED STATES MARSHAL, AND TERENCE F. MAC CARTHY, ROBERT S. BAILEY, WILLIAM A. BARNETT, CHARLES A. BELLOWS, EDWARD J. CALIHAN, JR., GEORGE F. CALLAGHAN, GEORGE J. COTSIRILOS, THOMAS D. DECKER, ANTONIO M. GASSAWAY AND CORNELIUS E. TOOLE, GENERAL COUNSEL, LEGAL OFFICE, CHICAGO METROPOLITAN COUNCIL NAACP,

Respondents.

BRIEF FOR RESPONDENTS CHICAGO COUNCIL OF LAWYERS ET AL. IN OPPOSITION TO PETITION FOR CERTIORARI.

MILTON I. SHADUR,
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BRIEF FOR RESPONDENTS CHICAGO COUNCIL OF LAWYERS ET AL. IN OPPOSITION TO PETITION FOR CERTIORARI.

Respondents Chicago Council of Lawyers, Edgar Bernhard, Elmer Gertz, Cecil C. Butler, Willard J. Lassers, Robert Plot-

kin, John H. Schlegel and Joel J. Sprayregen respectfully submit that the petition for a writ of certiorari should be denied.

QUESTIONS PRESENTED.

1. Whether the issues sought to be raised by the petitioner are appropriate for discretionary review by this Court at this time.

2. Whether, properly considered (and not as mischaracterized by petitioner), the decision of the Court of Appeals satisfies this Court's standards for the granting of certiorari.

3. Whether the Solicitor General's determination not to seek certiorari should be given weight by this Court in exercising its sound judicial discretion to grant or deny certiorari.

ARGUMENT.

I. The Issues Raised by Petitioner Are Not Now Appropriate for Discretionary Review by This Court.

Petitioner is the Clerk of the United States District Court for the Northern District of Illinois, the only one of the several appellees in the court below who has sought certiorari, and is represented in this Court by private counsel rather than by the Solicitor General. Petitioner asserts (Petition p. 18) that the decision below by the Seventh Circuit undermines the mandate of *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), conflicts with the decision of the Tenth Circuit in *United States* v. *Tijerina*, 412 F. 2d 661 (10th Cir.), *cert. den.* 396 U. S. 990 (1969), and will frustrate the efforts of the judiciary to prevent prejudice to litigants in civil cases arising out of extrajudicial statements by lawyers during trial. As we point out below, each of these contentions wrongfully characterizes the opinion of the Seventh Circuit and is without merit. Yet even were they arguably meritorious, in the exercise of sound discretion this Court ought not to grant certiorari in this case.

"Review on writ of certiorari is not a matter of right, but of sound judicial discretion. . . ."[1] In the exercise of that discretion, even petitions which raise serious constitutional questions (which this petition does not) are often denied because "the issue [is] not ripe enough" or because "the question had better await the perspective of time." *Darr* v. *Burford*, 339 U. S. 200, 227 (1950) (quotations from the dissent of Mr. Justice Frankfurter, discussing the significance of such denials). For three reasons the issues sought to be raised by petitioner are not sufficiently ripe for proper review by this Court and would be better dealt with after awaiting the perspective of time and their arising (if indeed they do arise) in proper form in the future.

First, contrary to what petitioner implies, the Seventh Circuit did not irresponsibly scuttle the attempts by the District Court for the Northern District of Illinois to regulate prejudicial extrajudicial statements by attorneys. It is obvious from even a superficial reading of Judge Swygert's opinion that the Court of Appeals was no less concerned than the District Court with assuring fair trials. The Court of Appeals meticulously examined the District Court rules in the dual constitutional light of that concern and of the guarantees of free speech; as the result of its examination, it upheld the rules in a number of respects, pointed out specific instances of the rules' unconstitutional overbreadth in others, and set out clear guidelines to be employed by the lower court in rewriting the rules. We respectfully submit, therefore, that any consideration by this Court should abide the promulgation of new rules by the District Court under the guidelines laid down by the Seventh Circuit, and any contention that may thereafter be made that such rules conflict with the assertion of First Amendment rights by lawyers affected thereby —a contention that may never be made. Under the mandate of the Court of Appeals, the District Court may and presumably will establish new rules that fully preserve the right to a fair trial while avoiding the pitfall of impermissible restraints on

1. Rule 19 of this Court.

freedom of speech, thus obviating any necessity for review by this Court.

Second, whether or not the District Court molds such new rules, the posture of this case makes it singularly inappropriate for this Court's review because it does not present the actual application of restraints to any specific exercise of free speech by respondents. The contrast in this respect between the situation that caused this suit to be brought initially and the situation that now exists, following the Court of Appeals' decision, is striking. When the complaint was filed the very existence of the District Court's vague and overbroad blanket rules created a chilling effect on the exercise of First Amendment freedoms by plaintiffs and all other lawyers that justified—indeed compelled—a judicial determination of plaintiffs' rights (see the majority opinion at Petition p. A-5 and the concurring opinion at Petition p. A-27). But once such chilling impact has been vitiated by the elimination of the blanket advance restraints on speech, the appropriate context for judicial consideration becomes the attempted application of *specific* restraints in a *specific* fact situation. Absent such a specific situation the issues advanced by petitioner are posed in the abstract. As this Court noted in *SS Monrosa* v. *Carbon Black Export*, 359 U. S. 180, 184 (1959):

> "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. . . . Resolution here [of the issue posed by the petition] can await a day when the issue is posed less abstractly."

Third, although petitioner claims the Court of Appeals' decision involves a conflict with the Tenth Circuit, petitioner himself recognizes (Petition, p. 18) that the Seventh Circuit is the first Court of Appeals to rule on the issues presented by this case. As explained at pages 6-7 of this Brief, the Tenth Circuit's *Tijerina* decision did *not* involve the application of a blanket rule proscribing lawyers' speech, as did the instant case; there is therefore no conflict of decisions involved. Moreover, the Seventh Circuit did not reach its decision in a vacuum. It

grounded its decision firmly on the prior law of the Circuit[2] which was in turn based upon long-standing decisions of this Court.[3] As we understand the operative standards, there is no occasion for this Court, as a matter of sound judicial discretion, to review the settled law of a circuit, grounded upon settled decisions of this Court, prior to an actual conflict with another circuit. We submit that this Court should "await the perspective of time" and a true conflict with other circuits, if one arises, before reviewing the issues raised by petitioner. At a minimum, such issues—now a matter of first impression—should reach this Court's scrutiny with the benefit of the considered judgment of more than one Circuit Court of Appeals. If such judgments produce no conflict, the wisdom of not accepting the issues for review is confirmed; if a conflict develops, the issues are then ripe for this Court's definitive resolution.

II. Petitioner Has Seriously Mischaracterized the Decision Below and Its Effect. Properly Considered, This Case Does Not Satisfy This Court's Standards for the Granting of Certiorari.

It requires only a reading of the thoughtful opinion of the Court of Appeals (Petition pp. A1-25, characterized in Judge Wyzanski's concurrence at p. A27 as "Judge Swygert's thorough opinion, prepared after full review of the authorities and mature consideration of basic principles and suppositious cases") to belie the misleading portrayal sought to be advanced by the Petition. That opinion did not embrace in their entirety the positions asserted by any of the parties or the intervenors before the Court of Appeals. But neither disagreements with that court's conclusions nor eagerness to seek review by this Court can justify misrepresenting the Court of Appeals' treatment of

2. *Chase* v. *Robson*, 435 F. 2d 1059 (7th Cir. 1970); *In re Oliver*, 452 F. 2d 111 (7th Cir. 1971). See Petition pp. A6-7.

3. *Craig* v. *Harney*, 331 U. S. 367 (1947); *Wood* v. *Georgia*, 370 U. S. 375 (1962).

the issues or validate petitioner's unjustified and pejorative characterizations of the decision below.

Because they are relevant to this Court's proper exercise of sound judicial discretion in considering the granting or denial of certiorari, we point to a few of the more egregious misstatements in the Petition in the order of their occurrence:

1. It is irresponsible to speak of the Court of Appeals as "undermin[ing] the *Sheppard* mandate" (Petition p. 18) or as making "a deliberate attempt sharply to limit this Court's decision" in *Sheppard* (Petition p. 20). No fair-minded reader can review the phrase-by-phrase parsing of the "no-comment" rules by Judge Swygert and so characterize his opinion. That opinion, by the very manner in which it has discussed and shaped detailed directives to the District Court for the redrafting of its rules, not only expresses but affirmatively demonstrates a deep concern with the requirements of fair trial.

2. Petitioner offers a complete non-sequitur (Petition p. 23) in support of his argument that a "reasonable likelihood" test is more appropriate than the "serious and imminent threat" test articulated by the Court of Appeals. If, as stated by petitioner, a reasonable likelihood of prejudice will suffice to cause reversal of a criminal conviction, a publication that does create such a likelihood has by definition caused an interference with the administration of justice. The Court of Appeals' test for limiting lawyer comments on pending litigation—whether it constitutes "a serious and imminent threat" to the administration of justice—would *a fortiori* apply to such a comment that *in fact* interferes with the administration of justice. Its formulation of the applicable standard would thus be squarely applicable to reversal-causing prejudice.

3. Despite petitioner's claim (Petition pp. 18, 24-25), the Tenth Circuit decision in *United States* v. *Tijerina*, 412 F. 2d 661 (10th Cir. 1969), *cert. denied* 396 U. S. 990 (1969), is not a "decision in conflict" with the decision below. Although

the *Tijerina* opinion articulates the constitutionality of a "reasonable likelihood" standard, *Tijerina* is plainly distinguishable from this case because the defendants there were charged with violating a specific order in the pending criminal case in which they were involved, and not general rules of court. Indeed, the public meeting at which the *Tijerina* defendants made their prohibited statements had been specifically discussed between defendants and the judge prior to the event (412 F. 2d at 666):

> "The Court disclosed to counsel the order which it intended to enter and which did not except the convention. No objection was made to the order entered and no effort was made to get it modified or reviewed."

Thus, although the *Tijerina* court did approve the "reasonable likelihood" formulation, it was dealing with a case in which the judge had specifically applied his prohibitory rule to a given set of facts after prior consideration of the probability of prejudice. This is a far different situation from the broad and general prohibitions involved in the present case. As the *Tijerina* court noted in distinguishing the "clear and present danger" precedents upon which the defendants there relied:

> "None of the foregoing decisions considered a situation where the contempt arose from the violation of an order . . . Here we have the violation of a court order." *Id.*

Given these distinctions between *Tijerina* and the present case, the differences in the two courts' verbalizations of the respective issues do not constitute "decision[s] in conflict" within the meaning of this Court's Rule 19.

4. Petitioner charges the Court of Appeals with incantations of formulae—"a dubious practice that is not an adequate substitute for a thoughtful weighing of values" (Petition p. 27). We respectfully refer this Court to Judge Swygert's opinion to consider whether or not it engaged in a "thoughtful weighing of values." It is also irresponsible for petitioner to speak of the decision below as "frustrating all the efforts of the judiciary to

prevent prejudice to litigants in civil cases arising out of extrajudicial statements by the lawyers during trial" (Petition p. 18). Of course, the Court of Appeals agreed (as do we) that "civil litigants, as well as criminal, can be prejudiced in their right to a fair trial by out-of-court statements" (Kaufman Report, quoted at Petition p. 27). Nothing in the Court of Appeals' opinion justifies petitioner's statement (Petition p. 18) that the Court "flatly rejected" that view.[4] Invalidating blanket advance prohibitions on speech, which was the effect of the Court of Appeals' decision (Petition pp. 21-25), in no way precludes the far more responsible approach of dealing with any threat to fair civil trials on a case-by-case basis. Only thus may the chilling effect of blanket prohibitions be eliminated, free speech rights be protected, and any adverse impact on the administration of justice be guarded against simultaneously.

5. Petitioner makes the unsupported—and false—assertion that extrajudicial statements during the course of trial "can only be for one reason—to influence the outcome of the litigation" (Petition p. 28). It is a truism that in the United States most major social and even political issues find their way, in one form or another, to court. In such public interest cases there is a significant societal interest—protected of course by the First Amendment—in having the important social problems presented by such suits fully and accurately discussed and understood by the general population. Our theory of government is staked very largely on the premise of informed and widespread public discussion of important issues. And it is precisely during the pendency of a case involving such issues that discussion is most important. As to this point *Bridges* v. *California*, 314 U. S. 252, 268-69 (1941), said:

4. The Petition also erroneously characterizes the Court of Appeals' decision in this respect as a "majority" decision rather than a unanimous decision. Judge Castle's opinion at Petition pages A28-29 was a partial dissent as to the Local Criminal Rules, but Judge Castle did not dissent from the invalidation of the Disciplinary Rule applicable to civil litigation.

> "It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below . . . produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion . . . No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression."

But if the public discussion of the issues in such pending cases is not only permissible but desirable, we risk hampering that discussion if we eliminate from it the lawyer who is handling the case. Progressing from this analysis, the Court of Appeals' opinion (Petition p. A-23) correctly rejected the silencing of the lawyer's voice, which is often the only one likely to be effective. It must be remembered that part of the civil rules struck down by the Seventh Circuit prohibited speech without any stated requirement that such speech affect the administration of justice.

6. Petitioner inaccurately points to the curbing of lawyer speech as "much more likely to give an unfair advantage to those who are powerful and well placed enough to have access to or control over the press and electronic media in marshalling or manipulating public opinion for or against the issues" (Petition p. 29). In truth, the impact of the Seventh Circuit's decision is to avoid the kind of "unfair advantage" referred to—a point that dovetails with the discussion in the preceding paragraph. In the kinds of public interest litigation adverted to there, the principal social problems almost always involve relationships between citizens and their governments. As a practical matter, rules which prevent extrajudicial statements by lawyers in the cases involving major public policy issues will work

principally to the disadvantage of the citizens who are suing their government. The government is surely "powerful and well placed enough" to find an effective way to make its views publicly known without its lawyer; the citizen-plaintiff may not be. To prohibit lawyers' speech on such issues, even though that speech does *not* have an adverse effect on the administration of justice, would be bad public policy as well as bad constitutional law. Moreover, since the "big" case that most frequently involves major public policy issues is likely to run on for years, the lawyer would be barred under the original District Court rules from participating in the public's discussion for a very long time indeed. Thus *Hills* v. *Gautreaux,* No. 74-1047 argued before this Court at the current term, was filed in 1966 and is still very much a "pending case." In that instance plaintiffs' lawyers, representing a class of poor persons, would have been barred from public discussion of the issues for a decade, and would be barred still.

* * * * *

In summary, petitioner has seriously distorted both the opinion below and its claimed effect, in an effort to depict that opinion as irresponsible and as a deliberate flouter of controlling authority. In fact, this first Court of Appeals to deal with the problem has essayed a studied reconciliation of First Amendment rights with blanket court rules whose principal aim is to protect fair trials, and has responsibly grounded its decision on settled law in its circuit and in this Court. The Seventh Circuit's resolution of the issues does not come within any of the reasons articulated in this Court's Rule 19, or afford any other basis, for the granting of certiorari in the exercise of this Court's sound judicial discretion.

III. The Determination by the Solicitor General Not to Seek Certiorari Should Be Given Weight by This Court.

One other factor bears on this Court's exercise of discretion. As stated at the outset of this Brief, H. Stuart Cunningham,

Clerk of the District Court that promulgated the rules in question, is the sole petitioner in this Court. The original defendants in the suit, all sued in their representative capacity because of their respective roles in enforcement of the challenged rules of court, were the then United States Attorney for the Northern District of Illinois, the then United States Marshal for that district and the then Clerk of the Court. All of those defendants were represented in the District Court and Court of Appeals by the United States Attorney (there were also intervenor-defendants who were separately represented in both courts below, but who have not joined either in the petitions for rehearing below or in the petition for certiorari here).

After the Court of Appeals' decision, however—a decision that adopted neither plaintiffs' entire position nor that of the defendants, but instead directed the District Court to redraft its rules under carefully framed guidelines—the Solicitor General refused to authorize the United States Attorney to file a petition for rehearing with the suggestion that it be heard en banc.[5] We are advised by the Solicitor General's office that it has also declined to file a response to the petition for certiorari with this Court, although this Court's Rule 21(4) specifically permits such a response by any respondent who supports the position of a petitioner.

Thus the Solicitor General, in whom Congress (28 U. S. C. §§ 516, 518, 519)[6] and the Attorney General have vested the

5. Petitioner filed an affidavit with the Court of Appeals stating that he had been so notified by the United States Attorney, at the time petitioner filed his own Petition for Rehearing October 16, 1975. See Appendix to this Brief for an unexecuted copy of the Affidavit. The original Affidavit is part of the record on file with this Court.

6. 28 U. S. C. § 516, "Conduct of litigation reserved to Department of Justice," provides:

> "Except as otherwise provided by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

(Continued on next page)

responsibility and discretion to conduct all appellate litigation in this Court in which the United States or any officer thereof is a party or is interested,[7] has not joined in seeking review by this Court. Two of the three government officials named as defendants (the United States Attorney and the Marshal) have not joined in the Petition.

In light of the nature of the Seventh Circuit's opinion (which effectively sends the District Court "back to the drawing board" to develop rules which are less sweeping in their prohibition of comment on pending litigation), the Solicitor General's exercise of his discretion by deciding not to press this matter for further review is both understandable and appropriate. We suggest that this Court may properly give weight to that decision in deciding whether to exercise its own discretionary power to review the decision by the Court of Appeals in this case.

CONCLUSION.

For all of the foregoing reasons—the inappropriateness of the issues for present review by this Court, the fact that the Seventh Circuit's decision (properly considered and not mischaracterized) does not satisfy this Court's standards for grant-

(*Continued from preceding page*)

28 U. S. C. § 518(a) "Conduct and argument of cases," provides:

> "(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested."

28 U. S. C. § 519, "Supervision of Litigation," provides in relevant part:

> "Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency or officer thereof is a party. . . ."

7. This Court has held that it is within the discretion and power of the Solicitor General to withdraw an issue from a case before this Court. *Utah* v. *United States,* 394 U. S. 89, 95 (1969).

ing certiorari, and the weight to be given the Solicitor General's determination not to seek certiorari—we submit that the petition for certiorari should be denied.

Respectfully submitted,

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April 1976

APPENDIX A.

AFFIDAVIT.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

H. STUART CUNNINGHAM, being duly sworn, states that:

1. He is the Clerk of the United States District Court for the Northern District of Illinois, and, in that capacity, has been named as a party defendant in the cause now pending in the United States Court of Appeals for the Seventh Circuit as Cause No. 74-1305.

2. Pursuant to motions heretofore filed, the time for filing a Petition for Rehearing and Suggestion for Rehearing En Banc in this cause has been extended to and including October 17, 1975.

3. He has been notified by the United States Attorney, Samuel K. Skinner, that the Solicitor General of the United States has refused to authorize the United States Attorney to file a petition for rehearing with the suggestion that it be heard en banc.

4. He has retained Henry L. Pitts and W. Gerald Thursby, who have been duly admitted to practice before this court, as his counsel in this proceeding, and said counsel are preparing to file on his behalf a Petition for Rehearing and Suggestion for Rehearing En Banc herein.

5. The number and complexity of the issues in this proceeding and their exceptional importance cannot fairly and adequately be presented within ten (10) pages of standard typographic printing pursuant to Fed. R. App. P. 40(b) and he respectfully requests permission to file such a Petition not exceeding fifteen (15) pages of standard typographic printing.

H. STUART CUNNINGHAM

Subscribed and Sworn to before me this ..... day of ....., 1975.

Notary Public.

No. 75-1296

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Respondents.

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI AND THE BRIEF IN OPPOSITION TO THE PETITION FILED BY THE RESPONDENT CHICAGO COUNCIL OF LAWYERS, ET AL.

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A reading of the Petition For Writ Of Certiorari To the United States Court Of Appeals For the Seventh Circuit and the Brief For Respondents Chicago Council of Lawyers et al. In Opposition To Petition For Certiorari requires the ten attorneys* who were the interveners in the lower court to respond and clarify their status and position.

---

* Terence F. MacCarthy, Robert S. Bailey, William A. Barnett, Charles A. Bellows, Edward J. Calihan, Jr., George F. Callaghan, George J. Cotsirilos, Thomas D. Decker, Antonio M. Gassaway and Cornelius E. Toole; General Council, Legal Office, Chicago Metropolitan Council NAACP.

It is further required that we briefly reiterate our legal position and explain our determination, and comment on the Solicitor General's determination not to seek or support the pending petition for writ of certiorari.

The petitioner, H. Stuart Cunningham, has properly listed us as Respondents. However, our status and position has been and remains somewhat different from that of the other two distinct groups of Respondents. The Chicago Council of Lawyers, An Association of Lawyers, Edgar Bernhard, Elmer Gertz, Cecil C. Butler, Willard J. Lassers, Robert Plotkin, John H. Schlegel and Joel J. Sprayregen, were the plaintiffs in the lower court who argued the unconstitutionality of the district court's no-comment rules. Respondents Samuel K. Skinner, the United States Attorney, and John J. Twomey, the United States Marshal, were named defendants in the lower court. They argued in support of the constitutionality of the no-comment rules. Unfortunately our status, as distinct from that of the other Respondents, is not made sufficiently clear by the Petition or the Brief In Opposition thereto.

After the filing of the complaint in the district court we, representing ourselves as attorneys regularly engaged in the representation of criminally charged defendants in the district court, moved and were granted leave to intervene. Further, we alleged that we do and accordingly should represent the alleged sub-class of those attorneys who regularly represent defendants in criminal cases in the Northern District of Illinois. (Our interests and arguments were and are thus limited to the applicability and propriety of the challenged rules in the context of criminal cases.) Finally, we expressed our support for and request that the no-comment rule (Local Criminal Rule 1.07, United States District Court, Northern District of

Illinois) be preserved, arguing the rule was consistent with and indeed required by *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). We accordingly moved to dismiss the complaint.

We filed extensive briefs in the district court and both briefed and argued the case in the Seventh Circuit Court of Appeals. Briefly summarized, our position was —and most importantly still remains—in support of the no-comment rules as they apply to criminal cases. We believe the rules are necessary if a defendant's right to a fair trial is to be protected against prejudicial publicity. We further argued that most prejudicial publicity, when it occurs, is usually caused by prosecutors or other law enforcement personnel, and that without the benefit of no-comment rules defendants would be left without adequate protection. Parenthetically, all of the suggested alternative remedies intended to offset prejudicial publicity act to a defendant's disadvantage by requiring a waiver of another right: speedy trial where the remedy is delay; a trial in another district where the remedy is a change of venue; and the right to a jury trial where the remedy is a jury waiver.

Desiring, as we do, to maximize the rights of our defendants to a fair trial, we view as not only legitimate but necessary in the short-term and accepted context of pending or imminent criminal litigation, the regulation and limitation of attorney comments.

Mention is made of our not joining in or supporting the Brief For Writ Of Certiorari. (Brief for Respondents Chicago Council of Lawyers, p. 2) This action, or more appropriately inaction, on our part is best understood and appreciated in a reading of Judge Swygert's opinion. *Chicago Council of Lawyers, et al.* v. *Bauer*, 522 F.2d 242 (1975) For the most part the opinion goes to great

pains to distinguish between the relative rights and obligations of prosecutors and defense attorneys. As we read and interpret the opinion, defense attorneys are given great latitude in making out-of-court statements.* Though we did not initially seek these concessions, we certainly and most understandably welcome them and cannot be now heard to ask that these distinctions and concessions be reconsidered.

However, this is not to say the actual results and consequences of the Seventh Circuit's opinion satisfies us. It does not. Notwithstanding Judge Swygert's express belief that ". . . specific rules are necessary. . ." (A 7 and 10) the fact remains there is no requirement that the district court, or for that matter the Judicial Council, adopt new rules. Assuming the district court elects, as we anticipate, not to attempt a redrafting of the no-comment rules, then defendants will be—as they are now—left without the most needed and totally necessary no-comment rules. (Parenthetically, the suggestion in the Chicago Council of Lawyers Brief that the Seventh Circuit ". . . upheld the rules in a number of respects. . ." (Chicago Council of Lawyers Brief, p. 3), should not and cannot be read as suggesting the rules are presently in force. They are not.)

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* Judge Swygert's opinion appears to give judicial approbation to a defense attorney: commenting on criminal charges beyond the mere assertion of innocence (A-8); suggesting the unconstitutionality or the injustice of the charges (A-14); commenting on the particulars of the case (A-14); commenting on the discretion of the prosecutor's office (A-14); taking the case to the public (A-14); soliciting defense funds (A-14); defending the accused's name in public (A-15). Conversely the opinion suggests that most of the no-comment proscriptions should apply to those involved on behalf of the government (A-13).

Candidly stated we, as members of the defense bar, would prefer rules redrafted in accordance with Judge Swygert's opinion, however, we *need* rules which we do not now have. Consistent with the position we have heretofore urged in this case we would gladly accept and can live with the rules declared unconstitutional by the Seventh Circuit Court of Appeals.

Appreciating the observations made in the prior paragraphs, the position of the Solicitor General in not joining in the petition for certiorari may be better understood. We respectfully suggest that the no-comment rules which were held unconstitutional and accordingly void by the Seventh Circuit Court of Appeals, are in practice potential proscriptions against the conduct of prosecutors. If we accept this conclusion it would follow that the Solicitor General would have no great desire to reinstate rules which for the most part sanction the activities of prosecutors.

Respectfully submitted,

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April, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1296

H. STUART CUNNINGHAM, CLERK, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

vs.

CHICAGO COUNCIL OF LAWYERS, AN ASSOCIATION OF LAWYERS, EDGAR BERNHARD, ELMER GERTZ, CECIL C. BUTLER, WILLARD J. LASSERS, ROBERT PLOTKIN, JOHN H. SCHLEGEL, JOEL J. SPRAYREGEN, SAMUEL K. SKINNER, UNITED STATES ATTORNEY, JOHN J. TWOMEY, UNITED STATES MARSHAL, AND TERENCE F. MAC CARTHY, ROBERT S. BAILEY, WILLIAM A. BARNETT, CHARLES A. BELLOWS, EDWARD J. CALIHAN, JR., GEORGE F. CALLAGHAN, GEORGE J. COTSIRILOS, THOMAS D. DECKER, ANTONIO M. GASSAWAY AND CORNELIUS E. TOOLE, GENERAL COUNSEL, LEGAL OFFICE, CHICAGO METROPOLITAN COUNCIL NAACP,

Respondents.

PETITIONER'S REPLY TO THE BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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PETITIONER'S REPLY TO THE BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The Brief in Opposition to the Petition for Certiorari makes two suggestions in support of the position that this Court should not review the decision of the Court of Appeals invalidating the

court rules drafted and adopted upon the recommendation of the Judicial Conference of the United States: first, it would be inappropriate for the Court to review that decision because the issues presented are "not ripe enough" to justify the Court's exercising its discretion pursuant to Rule 19; second, the review of the rules promulgated by the judicial branch of the government has not been initiated by the Solicitor General, an officer in the executive branch of the government.

The Brief in Opposition, by employing a studied obfuscation, could create misunderstanding concerning the factual background of this litigation and the parties who participated in it. At the outset it should be noted that the Brief was filed only on behalf of the Chicago Council of Lawyers, an organization of several hundred members of the Chicago bar and seven individual lawyers associated with that organization. These respondents were the plaintiffs who filed a complaint in two counts on behalf of themselves individually and as representatives of a class consisting of all lawyers practicing before the District Court, asking for injunctive relief and a declaratory judgment that the District Court's rules in question, including Disciplinary Rule 7-107 of the American Bar Association's Code of Professional Responsibility incorporated in the rules, are facially unconstitutional as violative of the plaintiffs' First Amendment rights. The plaintiffs alleged that they brought the action "to vindicate their rights, as lawyers," to comment publicly about pending cases in which they might then or thereafter be engaged unless it is first proved that their comments "create a clear and present danger of a serious and imminent threat to the administration of justice." The three named defendants were the United States Attorney for the Northern District of Illinois, the Marshal for the District (both being officials in the executive branch of the government), and the Clerk of the District Court, all of whom were alleged to participate in the enforcement of the rules. The additional ten named respondents are attorneys who were granted leave to intervene when they alleged that they

are attorneys regularly engaged in the representation of defendants in criminal cases in the Northern District of Illinois. In seeking leave to intervene, those ten respondents averred that they fully supported the rules, and further averred that the individual plaintiffs "are not themselves members of the subclass made up of attorneys who regularly represent defendants in criminal cases in this Court, a subclass which they purport to represent." (Motion to Declare Interveners the Proper Representatives of Attorneys Who Regularly Represent Defendants in Criminal Cases in this Court, paragraph 6)[1] Both the three named defendants and the ten interveners moved to dismiss the action. After extensive briefing and argument, in which the American Bar Association participated as amicus curiae in support of the rules, the District Court's Executive Committee granted the motions to dismiss, thereby making it unnecessary to determine whether the plaintiffs or the interveners were the proper representatives of the alleged class.

The Brief in Opposition (hereinafter "Council's Brief") also seeks to leave the impression that the rules are nothing more than a number of loosely-drafted and ill-advised local court rules and makes no attempt to respond to the petitioner's emphasis upon the origin and quasi-legislative nature of the rules. The Council's Brief completely ignores the extraordinarily intensive consideration given to the rules by the bench and bar throughout the country prior to their adoption and fails to recognize the fact that the rules are the work of the Judicial Conference of the United States, which was exercising the inherent supervisory power of the judicial branch of government pursuant to this Court's directions in *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966).

1. Interveners also alleged on information and belief that none of the individual plaintiffs "are presently engaged in or within the last few years have represented defendants charged with crimes in [the local district court]"; they went on to allege that the individual plaintiffs therefore "cannot and do not fairly and adequately represent, nor as apparent in a reading of their complaint, will they adequately protect the interests of the subclass—*i.e.*, attorneys who regularly represent defendants in criminal cases."

The Council's "Ripeness" Argument.

The Council's Brief suggests that "[f]or three reasons the issues sought to be raised by petitioner are not sufficiently ripe for proper review by this Court." (Council's Br., p. 3) The first of these reasons appears to be that because the Court of Appeals "upheld the rules in a number of respects" and because the District Court "presumably will establish new rules" under the "clear guidelines" set out by the Court of Appeals, this Court should not review the rules.

The assertion that the court below "upheld the rules in a number of respects" is, of course, completely false. The Court of Appeals quite clearly held that all the rules are unconstitutional on their face because they do not employ the "serious and imminent threat" standard.

And what are the "clear guidelines to be employed . . . in rewriting the rules"? The Council's Brief never identifies any of those guidelines. Indeed, in criticizing the rules relating to civil trials the respondents argue that those trials should be dealt with "on a case-by-case basis." In other words, there should be no rules at all. Moreover, it is less than candid to say that the civil rules struck down "prohibited speech without any stated requirement that such speech affect the administration of justice." (Council's Br., p. 9) As the District Court observed in its opinion, the "reasonable likelihood" standard "was clearly the underlying theory upon which the A. B. A. Disciplinary Rules were promulgated." 371 F. Supp. at 691, fn. 2. The Council must know that the Judicial Conference rule concerning civil cases adopted by the District Court as Rule 40 (Petition, p. 9) expressly incorporates the "reasonable likelihood" standard.

The Petition does not "mischaracterize" the decision below in this respect as the Council's Brief suggests. Petitioner reiterates that the holding of the Seventh Circuit, if permitted to stand, would effectively frustrate efforts of the judiciary to prevent prejudice to litigants in civil cases arising out of extrajudicial

statements by the lawyers during trial. The Council's Brief offers no suggestion as to any basis upon which rules regarding civil litigation could be sustained, if the decision in this case is not reversed. Indeed, the Council has virtually conceded this point, notwithstanding their complaints about mischaracterizing the decision, by their saying that the threats to fair trials in civil litigation should be dealt with on a case-by-case basis. If there are to be any meaningful or reasonably effective rules for the benefit of both the trial bench and the bar, the Council nowhere offers us any clue as to what they may be—and for good reason.

The Council insists that lawyers have a constitutionally protected right to make public statements regarding their cases during trial, because discussion of the issues is likely to attract more attention during the pendency of a case. In support of this position they quote from Mr. Justice Black's majority opinion in *Bridges* v. *California,* 314 U. S. 252 (1941) However, *Bridges* is inapposite because it dealt with statements made by Mr. Bridges and by the press and not with public comments of a lawyer while engaged in the trial of a case. Moreover, the quotation is taken out of context. There is no suggestion from Mr. Justice Black's comments that he was treating with public comments that could affect the outcome of the trial in question. In fact, he followed the statements quoted at page 9 of the Council's Brief by observing "[t]he very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." 314 U. S. at 271.

The second reason stated in support of the suggestion that this case is not "ripe for review" is that the case "does not present the actual application of restraints to any specific exercise of free speech by respondents." While this is correct, it must also follow that the very same dispute could not have been any less abstract at the time it was considered by the Court of Appeals. Attempting to evade the inevitable effect of their argument, the Council contends that the mere existence of the rules

created a "chilling effect" on the exercise of First Amendment freedoms and created a live controversy justifying a judicial determination of their rights. But this would set up an unequal and untenable dichotomy whereby court rules may be challenged on constitutional grounds at any time in the lower courts, with the privilege of Supreme Court review available exclusively to the challengers.

It is interesting to compare this argument with the position taken by the Council in the court below. When the petitioner first raised these jurisdictional matters in his Petition for Rehearing En Banc filed with the Court of Appeals (which four of the seven judges who considered the matter thought should be granted), the Council vigorously denied that any crucial jurisdictional issues had been overlooked. In their Brief in response to the Petition for Rehearing they said that the suggested jurisdictional issues were "non-existent" and went on to assert: "As for the implication that the issues are somehow not real because 'not addressed to specific, concrete facts,' it is wholly without merit."

The Council cannot have it both ways. If there is merit to its contention that this appeal fails to present a justiciable controversy, it follows that the opinion below must be reversed on jurisdictional grounds. And if the complaint did in fact raise a claim cognizable by the courts below, then the Court should grant certiorari and consider this appeal on the merits.

The third reason advanced in the Council's Brief in support of the suggestion that this case is not ripe for decision by this Court is that the Tenth Circuit decision in *United States* v. *Tijerina*, 412 F. 2d 661 (10th Cir. 1969), *cert. denied*, 396 U. S. 990 (1969), is not in conflict with the position of the Seventh Circuit regarding the issues in this proceeding. Even a cursory review of the decisions in the two circuits demonstates beyond doubt that the argument is fallacious.

In mid-1969 the Tenth Circuit in *Tijerina* rejected attacks on the constitutionality of a trial court's order that forbade the

attorneys and other participants in a pending case to "make or issue any public statement, written or oral, either at a public meeting or occasion or for public reporting or dissemination in any fashion regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the Court." 412 F. 2d at 663. The court said that such extrajudicial statements would create a reasonable likelihood of prejudicing a fair trial. As discussed at page 24 of the Petition, the Tenth Circuit squarely held that the "reasonable likelihood" standard was valid.

A few months later the Seventh Circuit in *Chase* v. *Robson*, 435 F. 2d 1059 (7th Cir. 1970), reviewed an order entered by the district court on the eve of a trial, which ordered counsel for the government, as well as the defendants, to "make or issue no statements, written or oral, either at a public meeting or occasion, or for public reporting or dissemination in any fashion, regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses, or the rulings of the court." 435 F. 2d at 1060. The trial court's order incorporated the reasonable likelihood standard. Within a matter of hours a Seventh Circuit Court of Appeals panel issued a writ of mandamus directing the trial court to vacate its order. As pointed out at page 25 of the Petition, the *Chase* court referred to *Tijerina* but misstated the *Tijerina* holding and went on to rule that the proper constitutional standard is "a serious and imminent threat to the administration of justice." If there was any doubt about the view of the Seventh Circuit, it definitely was dispelled by the decision in the instant case, which unequivocally rejected the "reasonable likelihood" standard as unconstitutional. This time, however, the Seventh Circuit court chose to ignore *Tijerina* and cited only its own decisions in *Chase* and *In re Oliver*, 452 F. 2d 111 (7th Cir. 1970).

The argument of the Council, therefore, that *Tijerina* is distinguishable because it involved a specific order in a pending

criminal case is without merit. The specific order in *Chase* was virtually identical to the order in *Tijerina*, but the Tenth Circuit held that the order met constitutional requirements, and the Seventh Circuit decisions make it abundantly clear that such orders do not incorporate the proper constitutional standard.

Review of the Judiciary's Court Rules Should Not Depend Upon the Solicitor General's Action or Inaction.

The rules were drafted and promulgated by the federal judiciary to protect the integrity of the judicial function by providing guidelines for the trial courts and the lawyers who are officers of those courts. Contrary to the impression which the Council apparently would like to create, the United States Attorney for the Northern District of Illinois, serving as counsel for the three defendants throughout the years this case was under consideration in the courts below, faithfully supported the rules, even though he was in a somewhat awkward position because the rules proscribed extrajudicial comments of government and non-government lawyers alike. Further, as noted earlier, the Solicitor General, as well as the United States Attorney and the Marshal, are officers of the executive branch of the federal government. While the latter two were defendants in this case, they had no role in the formulation of the existing rules, and they clearly have no authority to promulgate new court rules. For this reason alone, the Solicitor General could well have determined that it would be inappropriate for him to initiate any review of the decision below.

In any event, the petitioner here, who is an officer in the judicial branch of the federal government, and the District Court whose rules have been struck down, determined to retain independent counsel who could without question represent the judiciary's interests in the rules with undivided loyalty. The Council's suggestion that the Court should not review the rules unless the executive branch chooses to initiate such review would leave the federal courts without any means to carry out one of their principal supervisory powers.

CONCLUSION.

If there were any reservations about the imperative nature of the need for this Court to offer some guidance and clarification for the federal bench and bar in this vitally important area, those reservations surely have been laid at rest by the contentions made in the Council's Brief in Opposition to the Petition.

They certainly considered the constitutional issues important enough to file suit challenging the District Court rules in their entirety, before any litigation had been filed involving the application of any one of the rules. Having obtained a declaration in their behalf of the invalidity of all of the rules as formulated by the Judicial Conference and adopted by the local district court, they would now like to end the controversy which they initiated. Suddenly, for the first time, they now insist that the rules (whatever they may be after being mutilated by the decision below) should not be reviewed by the Court because "the posture of this case makes it singularly inappropriate for this Court's review because it does not present the actual application of restraints to any specific exercise of free speech by respondents." (Council's Br., p. 4) If this litigation presented a justiciable controversy when the plaintiffs filed their complaint, the controversy is just as real and in need of resolution today as it was then.

These very same rules, which were struck down by the reviewing court below, have been adopted in nearly all of the district courts throughout the country. Must all these district courts and the Judicial Conference go "back to the drawing board"—as the Council's Brief demands? And, if they must, how are they to recast their rules, especially as they pertain to federal civil trials? It would be an invitation to chaos for this Court to stay its hand, for if there are to be any authoritative court rules relating to this crucially important subject, now is the time to settle the questions raised by the Seventh Circuit decision. One of the purposes of the arduous study undertaken by the Judicial

Conference was to achieve a set of narrowly-drawn, uniform rules for the guidance of all federal district courts. This objective will not be achieved if the case-by-case approach suggested by the Council's Brief is followed. All of those rules will be in limbo and subject to challenge so long as this decision is permitted to stand. The concerns which the Council has recently discovered about whether the Seventh Circuit has rendered an advisory opinion are so disingenuous as to be unworthy of further consideration. Petitioner respectfully submits that the advancement of this argument is a compelling reason by itself for this Court to review the matter on the merits.

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